Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

IN RE:

BALBIR SINGH TULI,

DEBTOR.

BALBIR SINGH TULI,

PETITIONER

VS.

SPRECHER ENERGIE A.G.;

SPRECHER + SCHUH GROUP,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Balbir Singh Tuli
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Pro Se Petitioner
as the representative of his Chapter 11
Bankruptcy Estate retained by his confirmed Plan
of reorganization.

34PP

THE QUESTIONS PRESENTED FOR REVIEW BY THE SUPREME COURT OF THE UNITED STATES

Which of the two Bankruptcy Code §§ 553(a) and 1141(c) controls after confirmation of chapter 11 plan?

Whether the conflict between the Third and the Ninth Circuits in dealing with the tension between general provisions of § 553(a) and special provisions of § 1141(c) of Bankruptcy Code (11 U.S.C.), should be resolved by adopting Third Circuit's reconciliation in In re Continental Airlines, 134 F.3d 536, 541-42 (3rd Cir.1998) "hold[ing] that the right of a creditor to setoff in a bankruptcy reorganization proceeding must be duly exercised in the bankruptcy court before the plan of reorganization is confirmed; the failure to do so extinguishes the claim"; relied by petitioner in courts below to oppose respondents obtaining automatic preservation of their pre-petition claim to setoff their disputed damages claims (objected to by debtor under § 502(a)), as the effect of § 553(a) under the Ninth Circuit's prior conclusion in In re Laurentiis Entm't Group, Inc., 963 F.2d 1269, 1276 (9th Cir. 1992), "that section 553 must take precedence over section 1141."

LIST OF THE PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

APPELLANT

BALBIR SINGH TULI, Pro Se
Represents his Chapter 11 Bankruptcy Estate Retained by his confirmed Plan of Reorganization

APPELLEES

ALSTOM AG
A Swiss corporation, f/k/a
SPRECHER ENERGIE A.G., GEC ALSTHOM T&D A.G.,
SPRECHER + SCHUH A.G., Main Appellant

ALSTOM, INC.
A New York corporation, f/k/a
SPRECHER ENERGIE, INC,, GEC ALSTHOM T&D, INC.,
Subsidiary of and accompanying Alstom AG

SPRECHER + SCHUH GROUP
Consisting of

SPRECHER + SCHUH (HOLDING) A.G.
A Swiss corporation

SPRECHER + SCHUH LTD.
A Swiss corporation

SPRECHER + SCHUH, INC.
A New York corporation

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

Memorandum of the United States Court of Appeals for the Ninth Circuit in consolidated appeals Numbers 99-16871, 99-16910, filed 06/15/01. (Pages 1-3 of Appendix)

Memorandum of the United States Bankruptcy Appellate Panel of the Ninth Circuit in BAP appeal number AZ-98-1410-PRMe, filed 06/30/99. (Pages 4-15 of Appendix)

Memorandum of the United States Bankruptcy Appellate Panel of the Ninth Circuit in BAP consolidated appeal Number AZ-97-1124-PRMe, filed 06/09/99. (Relevant part of Statement of Facts). (Pages 21-27 of Appendix)

Note: None of the above Memoranda was deemed appropriate for publication of the disposition.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Date of the entry of the judgment or decree sought to be reviewed: 6/15/01

(See pages 18-20 of Appendix)

Date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to file the petition for rehearing: 08/09/01

(See pages 16-17 of Appendix)

Statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by Writ of Certiorari: 28 U.S.C. § 1254(1)

Note: Judgment sought to be reviewed by Writ of Certiorari, was entered by the United States Court of Appeal for the Ninth Circuit in Civil Appeals Nos. 99-16871 and 99-16910.

STATUTES INVOLVED IN THE CASE SET OUT VERBATIM

BANKRUPTCY CODE., Section 1141 (11 U.S.C. § 1141)

§ 1141. Effect of confirmation.

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, an entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the

plan or in the order confirming th eplan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan --

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not --

(i) a proof of the claim based on such debt is filed or deemed filed under Section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity

security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under Section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if --

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under Section 727(a) of this title if a case were a case under Chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

COLLIER ON BANKRUPTCY, Fifteenth Edition Revised (Rel. 74--6/00 Pub. 219) (Mathew Bender & Co.,)

STATUTES INVOLVED IN THE CASE
(Continued)

BANKRUPTCY CODE., Section 553
(11 U.S.C. § 553)

§ 553. Setoff.

(a) Except as otherwise provided in this Section and in Section 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that --

(1) the claim of such creditor against the debtor is disallowed;

COLLIER ON BANKRUPTCY, Fifteenth Edition Revised (Rel. 74--6/00 Pub. 219) (Mathew Bender & Co.,)

Note: For other relevant provisions of Bankruptcy Code, see the Appendix. (page 37 et. seq.)

A CONCISE STATEMENT OF THE CASE

1. The main respondent, Alstom, and other respondents have evaded to obtain relief from automatic stay and to establish their claims and alleged rights to setoff, both disputed by petitioner in his bankruptcy schedules, in his pleadings filed, and by filing objection (dkt. 235, under section 502) to filed proofs of claims and informal proofs of claims.

2. To allow Alstom A.G. (f/k/a/ Sprecher Energie Ltd.) and other respondents to discharge their onus to establish their claims to setoff in any court or arbitration, the Bankruptcy Court on April 21, 1994 "stayed" petitioner's estate's adversary proceeding No. 92-1330, pending arbitration of Alstom's claim, and later abstained from it to allow them to litigate their claims in any court. (Abstention has not been upheld in peititioner's appeal from that order).

3. In connection with confirmation of petitioner's plan of reorganization (case dkt 240), in January 14, 1997 hearing, the court deemed it "appropriate" to deal with

respondent's claims in the Contested Matter commenced by petitioner and there was no objection raised to this at the hearing by any respondent.

4. Alstom withdrew proofs of claim filed in its name by petitioner after Alstom's failure to timely file them. Alstom withdrew the proofs of claims after petitioner filed objection to is claim and to its alleged right to setoff. Alstom did this after its failure to file a timely response to petitioner's said objection, and when under the Local Bankruptcy Rule 3007-1 the claims were liable to be disallowed.

5. After 7 years of effort to reorganize his business as a California general contractor, petitioner's Plan of Reorganization was confirmed by Amended Order (dkt 383), but the Bankruptcy Court expressly preserved respondents' claims to set off their disputed claims of damages not established by them prior to confirmation of Plan.

6. The following facts are noticed by the Bankruptcy Appellate Panel of the Ninth Circuit in the

underlying BAP appeal Nos. AZ-97-1124, AZ-97-1421 and AZ-98-1410, filed June 9, 1999 and June 30, 1999, respectively:

Debtor is a contractor. In 1982, he was managing director of an Indian corporation that he owned, Consort Constructions Ltd. Alstom, a Swiss corporation, entered into a contract with the State Organization of Electricity of the Republic of Iraq to build power plants in Iraq. Alstom then entered into two subcontracts with Consort for performance of the civil works on the projects.

Work commenced on the projects in 1982. In December 1982, Alstom ordered Consort off the job because of alleged defects in performance. In a letter dated February 27, 1984, Alstom set out its understanding of the sums that were due to Consort for Consort's work and also the sums it asserted Consort owed it for alleged breaches of contract. (Ex. 4 to debtor's First Amended Disclosure Statement). Alstom claimed contract damages that exceeded the amount

Alstom indicated it owed to Consort.

At some point, Consort assigned its claims against Alstom to debtor. Despite debtor's demand, Alstom has not paid the amounts set out in the 1984 letter, because it asserts that any amounts it owes Consort are more than offset by amounts it alleges Consort owes for Consort's breach of contract.

An involuntary bankruptcy petition was filed against debtor in 1991. The court entered an order for relief in November 1991.

In December 1992, . . .debtor commenced adversary proceeding No. 92-1330 in bankruptcy court against Alstom and the Sprecher Group, seeking turnover of the amounts set out in Alstom's 1984 letter, pursuant to § 542 [of Bankruptcy Code], as well as additional amounts as damages for alleged breach of the subcontracts. He claims turnover for amounts he asserts are undisputed, and which he claims exceed the amount of any setoff Alstom might have.

In mid-December, he filed two proofs of claim in the bankruptcy case on behalf of Alstom, asserting claims for setoff against the amounts debtor asserts Alstom owes him for the work Consort did on the Iraqi projects. In February 1997, the court dismissed the Adversary proceeding without prejudice. It also granted Alstom's motion to withdraw the proofs of claim that debtor had filed on Alstom's behalf and denied debtor's motion to reconsider that ruling.

The result of the court's orders was to require that any adjudication of that dispute take place in arbitration or in a court other than the bankruptcy court.

Debtor also argued that Alstom lost any right to setoff by failing to obtain a determination of its claims and by what debtor asserted was Alstom's inequitable conduct in the case, prior to the confirmation of his plan of reorganization by court.

A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Question presented on page 1 hereof, is a question of law of exceptional importance for fulfillment of the purposes of chapter 11 of the Bankruptcy Code (11 U.S.C.), declared by this Court, i.e., "reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors"[1] and "maximizing the value of the bankruptcy estate"[2], affecting a rule of law of national application in which there is an overriding need for national uniformity, involved in the decision below, on which two U.S. Court of Appeals for the Third and the Ninth Circuits have previously reached conflicting results, and "other courts considering this and similar questions are closely divided," involves dealing with tension between the general provisions of § 553(a) and the

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1 Pioneer Inv. Services v. Brunswick Associates, 113 S.Ct. 14898, 1495-1498 (1993).

2 Toibb v. Radloff, 111 S.Ct. 2197, 2201, 115 L. Ed. 2d 145 (1991).

special provisions of § 1141(c), and to "decide which of the two code sections controls[3] after confirmation of the chapter 11 plan of reorganization, and whether as the effect of § 553(a), claim of setoff survives confirmation and can be used when a creditor is sued by reorganized debtor or by any representative of the estate retained under the confirmed plan, or as the effect of § 1141(c), upon confirmation of plan, claim of setoff is extinguished to fulfill the aforesaid purposes of chapter 11.

2. In view of above and the second question presented on page 1 hereof, to resolve the conflict between the Circuits, this is a fit case to petition for a writ of certiorari in accordance with this court's view in United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850., 1852, 10 L.Ed.2d 805 (1963), and U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 238, 109 S.Ct. 1026,

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3 In re Continental Airlines,
134 F.3d 536, 541-542 (3rd Cir. 1998);

In re De Laurentiis Entertainment Group, Inc.,
963 F.2d 1269, 1274-1275, 1279 (9th Cir. 1992)

1028-29, 103 L.Ed.2d 290 (1989).

3. Grant of a writ of certiorari is requested to resolve the conflict between the Circuits on the construction of federal Bankruptcy Code section 1141(c) read with section 553(a), consistent with other provisions of the Code listed on page 5 hereof, (stated verbatim on pages 8-11 hereof and on pages 37-48 of Appendix), vitally affecting rehabilitation through reorganization under Chapter 11 nationwide, including rehabilitation of petitioner and his wholly owned and controlled subsidiary, Consort, and to pay creditors under petitioner's confirmed Plan of Reorganization in his pending chapter 11 bankruptcy case in the United States Bankruptcy Court for the District of Arizona. The confirmed Plan of Reorganization (dkt. #332, Case #91-10615-PHX-RTB) provides the means for rehabilitation in ¶¶ 7.0.5 and 14.01, for the implementation of which this petition is crucial:

> "All claims of debtor and of the estate shall be retained and enforced by the debtor as the property of the estate. For the benefit of Consort's creditors through Consort's reorganization through Tuli's rehabilitation,

Tuli shall prosecute BAP Appeals Nos. AZ-97-1124 and AZ-97-1421, and in the event BAP or Court of Appeals or U.S. Supreme Court permits, Tuli shall enforce his estate's claim of turnover under 11 U.S.C. § 542, as well as its claim of damages for willful violation of automatic stay under 11 U.S.C. § 362(h), by GEC Alsthom [now Alstom AG]." (Confirmed plan ¶ 7.0.5). "All rights claims and remedies of the estate shall be preserved by the Plan for enforcement by the debtor postconfirmation, for the benefit of creditors of Consort in case No. 97-01409-PHX-RTB through the reorganization of Consort through the rehabilitation of Tuli in case No. 91-10615-PHX-RTB." (Confirmed plan ¶ 14.01).

4. The decision below involved the question, on which two courts of appeals had previously reached a contrary result, is clear from the following excerpts from the Ninth Circuit's and its Bankruptcy Appellate Panel's decisions in petitioner's appeals, and the Ninth Circuit's prior decision relied by them

(963 F.2d 1269, 1276-1277), directly conflicting with the Third Circuit's decision (134 F.3d 536, 541-542 (3rd Cir. 1998):

BAP: "Debtor argues. . .that Alstom has lost its claims to setoff by failing to obtain its determination of those rights and its inequitable conduct in the bankruptcy court." (Appendix p. 9). "Under [the Ninth Circuit's] holding, § 553(a) automatically preserved any right appellees had to setoff their claims against amounts debtor asserts appellees owe him." (Appendix p.13)

Ninth Circuit: "In 1998, the bankruptcy court confirmed Plaintiff's plan under Chapter 11. The order preserved all claims that Plaintif had against Defendants. Defendants moved to amend the order to clarify that, if Plaintiff eventually recovers damages under the Iraqi susbcontracts, then Defendants' claims for setoffs against those damages are preserved. The court made that amendment, which Plaintiff now disputes. Specifically, he argues that any setoff was discharged automatically when the plan was confirmed. To the

contrary, this court has held that, under 11 U.S.C. § 553(a), pre-petition rights to setoff (like those that Defendants assert here) survive the general discharge of debts that occurs, under 11 U.S.C. § 1141, when a plan is confirmed. Carolco Television, Inc. v. Nat'l Broad. Co. (In re De Laurentiis Entm't Group, Inc.), 963 F.2d 1268, 1276 (9th Cir. 1992)." (Appendix pp. 2-3).

In re De Laurentiis Entertainment Group, Inc., 963 F.2d 1269, 1276-1277 (9th Cir. 1992):

"We conclude that section 553 must take precedence over section 1141."

In re Continental Airlines, 134 F.3d 536, 541-542 (3rd Cir. 1998):

"We recognize that a right of setoff is preserved under § in a bankruptcy proceeding but we believe that the right must be exercised by the creditor in timely fashion and appropriately asserted in accordance with other provisions of the Bankruptcy Code." (at 541.)

". . .the right of a creditor to setoff in a bankruptcy reorganization proceeding must be duly exercised in the bankruptcy court before the plan of reorganization is confirmed; the failure to do so extinguishes the claim." (at 542.)

5. Petitioner's contention that "[a]ny setoff was automatically discharged [permanently stayed, i.e., practically extinguished] when the plan was confirmed," based on the Third Circuit's view, because the respondents, rather than establishing their claims and right to setoff before plan confirmation, withdrew their claims against which petitioner filed objection and also disputed respondents' right to setoff. (dkt. 235.).

6. The Supreme Court declined to address identical question arising in a chapter 13 case, in Citizens Bank of Maryland v. Strumpf, 516 U.S. --, 133 L.Ed,2s 258, 116 S.Ct.--(1995) (See footnote on po. 264 of 133 L.Ed.2d), because respondents raised the contention for the first time before the Supreme Court. ("We decline to address

respondent's' contention, not raised below, that the confirmation of his Chapter 13 Plan under 11 USC § 1327 (11 USCS § 1327) precluded petitioner's exercise of its setoff right.") This important question deserves to be addressed by the Supreme Court in this Chapter 11 case in the interest of fulfillment of the purposes of Chapter 11 of the Bankruptcy Code, i.e., (1) to permit successful rehabilitation of debtors (NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527, 104 S.Ct. 1188, 1196, 79 L.Ed.2d 482 (1984)); and (2) to maximize the value of the estate (Toibb v. Radloff, -- U.S. --, 111 S.Ct. 2197, 2201, 115 L.Ed.2d 145 (1991). See also Pioneer Inv. Services v. Brunswick Associates, 113 S.Ct. 1489, 1495, 1498 (1993) ("Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors.").

THE CONFLICT BETWEEN THE CIRCUITS ON THE CONSTRUCTION OF BANKRUPTCY CODE § § 1141(c) & 553(a), IS LIKELY TO BE RESOLVED IN FAVOR OF THE THIRD CIRCUIT'S BETTER VIEW OF THE LAW AND WILL CHANGE THE OUTCOME OF APPEAL BEFORE 9TH CIRCUIT FOR SUCCESSFUL REHABILITATION OF PETITIONER & HIS SUBSIDIARY

7. The question presented to be addressed by this Court, ultimately boils down to this:

WHICH IS THE BETTER CONSTRUCTION OF BANKRUPTCY CODE:

(1) § 553(a) preserves in a bankruptcy proceeding a pre-petition right to setoff, but that right must be exercised by the creditor in a timely fashion and appropriately asserted in accordance with other provisions of the Bankruptcy Code. In a Chapter 11 reorganization proceeding, that right must be duly exercised by the creditor before the plan of reorganization is confirmed; the failure to do so extinguishes the claim. In other words, the automatic stay of § 362(a) against exercise of a right of setoff against property of the estate (including a claim against the creditor), by the operation of § 1141(c) upon

confirmation of plan or reorganization and the retention of the property by debtor under the plan, becomes a permanent stay with the practical effect that of extinguishment. As concluded by the Third Circuit, or that:

(2) § § 1141(c) and 553(a) are in direct conflict with each other. The language of § 553(a) controls rest of the Code and, therefore, takes precedence over § 1141(c), and preserves a right to setoff after confirmation of a Chapter 11 plan of reorganization. As concluded by the Ninth Circuit.

8. The Third Circuit's construction is better than that of the Ninth Circuit, in view of the following:

(a) The overriding language of § 553(a), to the extent it purports to control rest of the Code, must be strictly construed. Not liberally applied to render ineffective § 1141(c) in respect of an unestablished claim of setoff right, and in respect of a claim which is in dispute. § 553(a), even if literally construed, purports to keep unaffected "right of a creditor to offset", i.e., an established claim of right to setoff, when the creditor's claim to be setoff or its claim of right to

setoff is disputed or questioned by trustee or debtor-in-possession. Hence, an unestablished claim of setoff is not preserved after confirmation of a plan of reorganization, and § 553(a) does not take precedence over § 1141(c).

(b) The overriding language of § 553(a) is merely to clarify that in a bankruptcy proceeding, a valid pre-petition right to setoff held by a creditor shall not be rejected as a preference, but subject to the Bankruptcy Court's discretion as a court of equity, the creditor may (not shall) be permitted to exercise its right in accordance with the requirements of the Code for such exercise of valid right to setoff.

(c) A confirmed plan or reorganization, if deemed to preserve a disputed and unestablished setoff claim against a claim which was property of the estate and is retained by debtor under the plan, would make the plan unfair and inequitable to unsecured creditors and to the debtor, and on appeal from the order of confirmation, the order shall be modified and those claims of setoff which were not established to be valid before confirmation of the plan, shall not be

preserved by the plan. Therefore, only those setoff claims which have the validity to treat a creditor's claim as a secured claim under § 506, can be treated as such in plan confirmation under § 1129(b) as "fair and equitable" and not discriminative plan. Baker v. Gold Seal Liquors, 417 U.S. 467, 470-474 (1974), is instructive in this connection. ("The public interest, as well as the interests of creditors and stockholders, is at issue.[4] Hence, in Bankruptcy Court's discretion properly exercises by equitable balancing of the interests involved, while keeping the overriding aim of rehabilitation of debtor in view, the court may provide otherwise as provided in § 1141(c)'s exception.

(d) The Third Circuit's construction is consistent

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4 The contours of plans have emerged which have given new meaning and insight into the statutory words "fair and equitable." The preference sought here shows no exceptional circumstances which in equity justify the discrimination.

with Code sections 362 and 363, (which control operation of section 553(a), as also with the connected provisions listed on page 5 hereof, the Ninth Circuit's construction is inconsistent with those provisions of the Code. (Pages 6-9 hereof and 37 et. seq. of Appendix.) A court's sole function is to enforce statutory language, unless . . . "the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S.Ct. 1026, 1031, 1032 L.Ed.2d 290 (1989). "[T]hose who drafted [the Bankruptcy Code] knew that [the] free exercise [of setoff rights] could inhibit rehabilitation and bankruptcy policies like fair distribution of funds inadequate to satisfy the debts of the petitioner in bankruptcy. . . . Even creditors whose claims are secured under the Code must submit to the risk inherent in judicial suspension [supervision] of the rights they normal would have to enforce their claims against property of the debtor." In re Cascade Roads, Inc., 34 F.3d 756, 766 (9th Cir. 1994), quoting approvingly from Third Circuit's Norton

decision, 717 F.2d at 773, which is relied by that Circuit in In re Continental Airlines, supra.

(e) Chapter 13 precedents support In re Continental Airlines view. They should apply to Chapter 11, because of similarity of language of § 1327 and § 1141. § 1327 has uniformally been held to be not affected by § 553(a). There is no justifiable reason to treat § 1141(c) differently than § 1327, vis-a-vis § 553(a). See Laurentiis, 963 F.2d 1269, 1275

(f) Section 553(a) is a general provision which applies to different chapters, but section 1141(c) is a special provision applicable to Chapter 11 only, and, therefore, should take precedence.

CONCLUSION

In view of the foregoing position, this petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, to review its decision filed June 15, 2001 in Civil Appeal No. 99-16910 consolidated with No. 99-16871, rehearing and rehearing en banc on which was denied on August 9, 2001, deserve to be granted to resolve the conflict between the Ninth Circuit and the Third Circuit on statutory construction of Bankruptcy Code § 1141(c) read with § 553(a) on the crucial question presented herein, vitally affecting rehabilitation through reorganization under Chapter 11 of the Code nationwide, including rehabilitation of petitioner and his wholly owned and managed subsidiary, Consort Constructions (P) Ltd. ("Consort").

PRAYER

With utmost respect and in all humility, petitioner, as a citizen of the United States of America, acting as the representative of his Chapter 11 retained estate and that of his subsidiary, Consort, in their Chapter 11 reorganization cases,

and obligated under ¶¶ 7.0.5 and 14.1 of his confirmed plan of reorganization to seek relief from this Court so as to recover dues for work done for Alstom AG, withheld by it as security for alleged setoff right of disputed claim of damages it has not established in any court or other forum since 1984, particularly since November 1991 when the Bankruptcy Court entered an order of relief under Chapter 11 in petitioner's reorganization proceeding; petitioner prays for the grant of this petition, which is crucial for him and his alter ego Consort's rehabilitation under the confirmed plan of reorganization.

RESPECTFULLY SUBMITTED this 9th day of February, 2002.

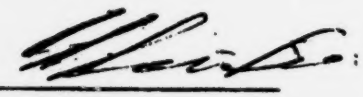
Balbir Singh Tuli
7373 E. Scottsdale Mall, Ste. 1
Scottsdale, Arizona 85251
(480) 949-8000
Pro Se Petitioner as the Representative of his Chapter 11 Estate retained under the Confirmed Plan of Reorganization.

PROOF OF FILING BY COURIER SERVICE

Under penalty of perjury under the laws of the United States of America, I. Balbir Singh Tuli, state that an original and thirty-nine copies (total forty) of his Petition for a writ of certiorari and of an Appendix therewith, are transmitted this 9th day of February, 2002 by Federal Express Courier Service for delivery on next working day, Monday, February 11, 2002, to:

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
1 First Street N.E.
Washington, D.C. 20543-0001
(202) 479-3000

Executed this 9th day of February, 2002, in the county of Maricopa, State of Arizona.

BALBIR SINGH TULI: 

PROOF OF SERVICE
ON RESPONDENTS'
COUNSEL: ENCLOSED

(2)
Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE:

BALBIR SINGH TULI,

DEBTOR.

BALBIR SINGH TULI,

PETITIONER

VS.

SPRECHER ENERGIE A.G.;

SPRECHER + SCHUH GROUP,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Balbir Singh Tuli
7373 E. Scottsdale Mall, Suite 1
Scottsdale, Arizona 85251
(480) 949-8000

Pro Se Petitioner
as the representative of his Chapter 11
Bankruptcy Estate retained by his confirmed Plan
of reorganization.

50pp

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: BALBIR SINGH TULI Debtor	Nos. 99-16871 99-16910
BALBIR SINGH TULI, Appellant, v. SPRECHER ENERGIE A.G.; SPRECHER + SCHUH GROUP, Appellees.	BAP Nos. AZ-97-01124-PRMe AZ-97-01421-PRMe (Consolidated) AZ-98-1410-PRMe (Related) MEMORANDUM

Appeals from the Ninth Circuit
Bankruptcy Appellate Panel
Perris, Russell, and Meyers, Bankruptcy Judges, Presiding

Submitted June 11, 2001
San Francisco, California

Before: HILL, *** GRABER, and McKEOWN, Circuit Judges

*** The Honorable James C. Hill, Senior Circuit Judge for the Eleventh Circuit, sitting by designation.

Plaintiff Balbir Singh Tuli appeals pro se three orders of the Bankruptcy court, relating to an adversary proceeding that he instituted against two Swiss companies. The Bankruptcy Appellate Panel (BAP) affirmed, as do we.

1. #########

2. #########

3. Defendant's Motion to Amend

In 1998, the bankruptcy court confirmed Plaintiff's plan under Chapter 11. The order preserved all claims that Plaintiff had against Defendants. Defendants moved to amend the order to clarify that, if Plaintiff eventually recovers damages under the Iraqi subcontracts, then Defendants' claims for setoffs against those damages are preserved. The court made that amendment which Plaintiff now disputes.

Specifically, he argues that any setoff was discharged automatically when the plan was confirmed. To the contrary, this court has held that, under 11 U.S.C. § 553(a), pre-petition

rights to a setoff (like those that Defendants asset here) survive the general discharge of debts that occurs, under 11 U.S.C. § 1141, when a plan is confirmed. Carolco Television, Inc. v. Nat'l Broad. Co. (In re De Laurentiis Entm't Group Inc.), 963 F.2d 1269, 1276 (9th Cir. 1992).

Plaintiff argues that Defendants' generally bad conduct during the course of this long-running dispute should create an exception to the rule in § 553(a). That statute contains three exceptions, none of which is implicated here, and none of which supports Plaintiff's theory. Accordingly, the amendment was permissible.

4. ########

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE

PANEL OF THE NINTH CIRCUIT

In re:	)	BAP No.
	)	AZ-98-1410-PRMe
BALBIR SINGH TULI	)	Bk. No.
Debtor.	)	91-10615-PHX-RTB
_____	)	
	)	
BALBIR SINGH TULI	)	
	)	
Appellant,	)	
	)	MEMORANDUM
v.	)	
SPRECHER ENERGIE A.	)	
G., now known as GEC	)	
ALSTOM T&D A.G., and	)	
GEC ALSTOM T&D,	)	
INC.; SPRECHER + SCHUH	)	
LTD.; SPRECHER + SCHUH	)	
HOLDING A.G.;	)	
SPRECHER + SCHUH,	)	
INC.,	)	
Appellees.	)	
_____	)	

Argued and Submitted on May 20, 1999
at Phoenix, Arizona

Filed - June 30, 1999

Appeal from the United States Bankruptcy Court
for the District of Arizona
Honorable Redfield T. Baum, Bankruptcy Judge, Presiding

Debtor Balbir Singh Tuli (debtor) appeals an amended order confirming his chapter 11[1] plan of reorganization. He asserts that the bankruptcy court erred in adding language to the confirmation order that carved out claims by and against appellees GEC Alstom A.G. and GEC Alstom T&D, Inc. (Alstom) and Sprecher + Schuh, Ltd., Sprecher + Schuh Holding A.G. and Sprecher + Schuh, Inc. (Sprecher)[2] from the effect of the plan and from discharge. We AFFIRM.

FACTS

Debtor, who is a contractor, has been engaged for some years in a dispute with appellees with regard to a contract to build power plants in Iraq in the early 1980's. The facts relating to that dispute are more completely set out in our unpublished decision in two consolidated appeals, BAP No.

---

[1] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-90936

[2] We refer to Alstom and Sprecher collectively as "appellees."

AZ-97-1124 and AZ-97-1421. For purposes of this appeal, it is enough to say that debtor assets that appellees owe him money for work her performed on the construction project, and appellees assert that any amounts they owe debtor are more than set off by amounts they assert debtor owes them. After an involuntary chapter 11 petition was filed against debtor in 1991, debtor commenced an adversary proceeding in an effort to obtain a determination of those disputes. The bankruptcy court stayed the proceeding pending arbitration before the International Chamber of Commerce (ICC), based on an arbitration provision in the contracts. The dispute was never arbitrated, and in 1997, the court dismissed the adversary proceeding for lack of prosecution. Debtor then filed proofs of claim on behalf of Alstom, apparently attempting to get the bankruptcy court to determine the claims in the context of the main bankruptcy case,. despite the court's earlier determination that the claims should be arbitrated. The bankruptcy court allowed Alstom's motion to withdraw those

proofs of claim. Debtor's appeal of the order dismissing the adversary proceeding for lack of prosecution and the order allowing withdrawal of proofs of claim are disposed of in a separate Memorandum decision issued on June 9, 1999.

The court advised debtor that it would not approve any plan of reorganization that deprived appellees of their right to contest whether they owed money to debtor. On June 3, 1998, the court confirmed debtor's chapter 11 plan. Debtor submitted an order for the court's signature that provided that debtor was discharged of all dischargeable debts, and preserved all claims by debtor against appellees. The court entered the order, and Alstom moved to amend the order to also preserve its claims against debtor. The bankruptcy court entered an amended order, which excepted from debtor's discharge any debt owed to appellees and preserved appellees' claims against debtor.

Debtor appeals. He asks that the Panel modify the amended order confirming the plan to delete language that

preserves claims held by appellees against debtor.

ISSUES

1. Whether the appeal is moot.

2. Whether the bankruptcy court abused its discretion in granting Alstom's motion to amend the order confirming the plan to include language carving out the claims by and against appellees from the effect of the plan.[3]

STANDARD OF REVIEW

The Panel reviews a court's ruling on a motion to amend pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e) for abuse of discretion. In re Sandoval, 186 B.R. 470, 493 (9th Cir. BAP 1995).

---

[3] The motion to amend was filed by Alstom. The amended order carves out the claims of all appellees, and all appellees argue for affirmance of the order.

1. ########

2. The bankruptcy court did not abuse its discretion in granting Alstom's motion to amend the order confirming the plan.

Debtor argues that the court erred in carving out from discharge and from the effect of the plan any claims appellees have against debtor. Although his argument is not clear, he appears to assert that the court could not except those claims from his discharge without an adversary proceeding[4], and that Alstom has lost its claims to setoff by failing to obtain a determination of those rights and by its inequitable conduct in the bankruptcy case.

Section 1141(d)(1) (A) provides that, except as otherwise provided in the plan or in the order confirming the

---

4. Fed. R. Bankr. P. 7001 provides that a proceeding to determine the dischargeability of a debt must be brought as an adversary proceeding.

plan, confirmation of the plan "discharges the debtor from any debt that arose before the date of such confirmation . . . . . " That provision gives the court authority to approve a plan that carves out specified claims from the general discharge set out in § 1141(d).

The bankruptcy court did not abuse its discretion in carving out any claims to setoff that appellees might have against debtor. Although the language of the amended order confirming the plan is very broad and could be read to preserve claims against debtor personally, we asked counsel at oral argument whether appellees asserted any claims against debtor personally or whether their claims were limited to claims of setoff. Counsel for Alstom said that he could not respond without consulting with his client. After oral argument, we entered an order requiring appellees to advise the Panel whether they would stipulate that the language of the order should be interpreted to preserve only claims to a right

to setoff. Counsel for both appellees have responded with stipulations that the reservations of rights included in the amended order confirming the plan should be interpreted as reserving only their right, if any, to setoff and not as including any right to affirmative relief against debtor. Pursuant to that stipulated interpretation of the amended order, the only claims preserved are claims of setoff.

Section 553(a) provides that, with exceptions not relevant here.

The Ninth Circuit has held that a creditor's rights to setoff survive a § 1141 discharge. In In re De Laurentiis Entertainment Group, Inc., 963 F.2d 1269 (9th Cir. 1992), the debtor filed a plan or reorganization, which was confirmed, under which a new entity, Carolco Television, Inc. (CTI), acquired the rights of the debtor to a claim for $1.25 million against the National Broadcasting Co. (NBC). During the debtor's bankruptcy case, NBC had asserted a right to setoff against that claim for a $1.6 million debt it claimed the debtor

owed to NBC. The plan of reorganization provided that the debtor's right to the $1.25 million claim against NBC was transferred "free and clear" of all prebankruptcy interests not listed in the plan. Although NBC's $1.6 million claim was not listed in the plan, NBC did not object to the plan or contest the order confirming the plan. Id. at 1271.

CTI sued NBC on the prebankruptcy debt, and NBC asserted its claim as a setoff against the debt. CTI objected to the setoff claim, arguing that the debt had been discharged when the plan was confirmed.

The court considered the apparent conflict between § 1141, which provides that property dealt with by the plan is free and clear of all claims and interests of creditors, and that the order confirming the plan discharges the debtor from debts that arose before confirmation, and § 553(a), which "protects the right to a setoff from the operation of the remainder of the bankruptcy code." Id. at 1274. The court concluded:

[S]ection 553 must take precedence over section 1141.

> In reaching this conclusion, we rely not only on . . . persuasive authority, but also on the language and structure of section 553 and the policies which underlie it. Section 553 provides that, with listed exceptions not relevant here, "this title does not affect the right of any creditor to offset a mutual debt. . . ." This language not only establishes a right to setoffs in bankruptcy, subject to enumerated exceptions, but seems intended to control notwithstanding any other provision of the Bankruptcy Code. To give section 1141 precedence would ignore this language.

Id. at 1276. The court also recognized that

> the primacy of setoffs is essential to the equitable treatment of creditors. A setoff is allowed as a defense to a claim brought by the debtor against a creditor. The creditor can claim only an amount large enough to offset its debt; it cannot collect anything from the debtor. Absent a setoff, a creditor . . . is in the worst of both worlds: it must pay its debt to the debtor in full, but is only entitled to receive a tiny fraction of the money the debtor owes it. It was to avoid this unfairness to creditors that setoffs were allowed in bankruptcy in the first place.

Id. at 1277.

Under that holding, § 553(a) automatically preserved any right appellees had to set off their claims against amounts debtor asserts appellees owe him. The court's addition of language providing that debtor's discharge does not cover appellee's claims, and that the claims by and against debtor are

preserved, merely clarified the effect of § 553(a) on the claims of these parties. Adding that language was not an abuse of discretion.

Further, the bankruptcy court in 1994 had ordered that the dispute between debtor and appellees be resolved through arbitration before the ICC. The court made it clear to debtor on numerous occasions that the claims should be resolved in a forum other than the bankruptcy court. The bankruptcy court did not abuse its discretion in using the carve-out language in the amended order confirming the plan to implement its earlier orders requiring that the claims be resolved outside the bankruptcy process. See § 105(a).

Debtor also argues that Alstom lost any right to setoff by failing to obtain a determination of its claims and by what debtor asserts was Alstom's inequitable conduct in the case. Any argument regarding Alstom's loss of setoff rights should be addressed to and resolved by the tribunal that adjudicates the contract dispute between these parties.

CONCLUSION

This appeal is not moot, because it challenges only the language added to the order confirming the plan, and the Panel could fashion effective relief. The bankruptcy court did not abuse its discretion in amending the order confirming the plan to preserve the setoff claims of appellees against debtor. As appellees have stipulated, the amended order does not permit appellees to seek affirmative relief against debtor. We AFFIRM.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG - 9 2001

In re: BALBIR SINGH TULI Debtor	Nos. 99-16871 99-16910
BALBIR SINGH TULI, Appellant, v. SPRECHER ENERGIE A.G.; SPRECHER + SCHUH GROUP, Appellees.	BAP Nos. AZ-97-01124-PRMe AZ-97-01421-PRMe (Consolidated) AZ-98-1410-PRMe (Related) ORDER

Before: HILL*****, GRABER, and McKEOWN, Circuit Judges

The panel has voted to deny the petition for rehearing.

Judges Graber and McKeown have voted to deny the petition

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* The Honorable James C. Hill, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

for rehearing en banc, and Judge Hill has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

MANDATE ISSUED Aug. 30, 2001

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: BALBIR SINGH TULI

Debtor

Nos. 99-16871
CT/AG#:
AZ-97-01124-PRMe

BALBIR SINGH TULI,

Appellant

v.

SPRECHER ENERGIE A.G.; SPRECHER + SCHUH GROUP,

Appellees.

No. 99-16910
CT/AG#
AZ-97-01424-PRMe

In re: BALBIR SINGH TULI

Debtor

BALBIR SINGH TULI,

Appellant

v.

SPRECHER ENERGIE A.G.; SPRECHER + SCHUH GROUP,

Appellees.

APPEAL FROM the United States Bankruptcy Appellate Panel of the Ninth Circuit.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States Bankruptcy Appellate Panel of the Ninth Circuit and was duly submitted.

ON CONSIDERATION WHEREOF, It is not here ordered and adjudged by this Court, that the judgment of the said Bankruptcy Appellate Panel in this cause be, and hereby is AFFIRMED.

Filed and entered June 15, 2001.

Office of the Clerk
United States Court of Appeals for the
Ninth Circuit
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94119-3939

August 30, 2001

BAP Clerk
Bankruptcy Appellate Panel
125 South Grand Avenue
Pasadena, CA 91105

C.A. No.	Title	Agency/ D.C. No.
99-16871	Tuli v. Sprecher Energie	AZ-97-01124-PRMe
99-16910	Tuli v. Sprecher Energie	AZ-97-01124-PRMe

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter. Counsel are being served with a copy of this letter only.

[X] Certified copy of the Decree of the Court
[ ] Judgment of the National Labor Relations Board
[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,
Cathy A Catterson
Clerk of Court

By: Juanja V. Ross
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE

PANEL OF THE NINTH CIRCUIT

In re:	)	BAP No.
	)	AZ-98-1410-PRMe
BALBIR SINGH TULI	)	Bk. No.
Debtor.	)	91-10615-PHX-RTB
_____	)	
	)	
BALBIR SINGH TULI	)	
	)	
Appellant,	)	
	)	MEMORANDUM
v.	)	
SPRECHER ENERGIE A.	)	
G., now known as GEC	)	
ALSTOM T&D A.G., and	)	
GEC ALSTOM T&D,	)	
INC.; SPRECHER + SCHUH	)	
LTD.; SPRECHER + SCHUH	)	
HOLDING A.G.;	)	
SPRECHER + SCHUH,	)	
INC.,	)	
Appellees.	)	
_____	)	

Argued and Submitted on May 20, 1999
at Phoenix, Arizona

Filed - June 9, 1999

Appeal from the United States Bankruptcy Court
for the District of Arizona
Honorable Redfield T. Baum, Bankruptcy Judge, Presiding

Debtor appeals an order dismissing an adversary proceeding he filed in his bankruptcy case (AZ-97-1124) and an order allowing withdrawal of proofs of claim debtor filed on behalf of appellees Sprecher + Schuh Holding A.G., Sprecher + Schuh, Ltd. and Sprecher + Schuh, Inc. (Sprecher Group) and GEC Alstom T&D, A.G. and GEC Alstom, Inc. (Alstom)[1] (AZ-97-1421). Both orders relate to a dispute regarding a 1982 contract for the construction of a power plant in Iraq. The result of the court's orders was to require that any adjudication of that dispute take place in arbitration or in a court other than the bankruptcy court. The two appeals have been consolidated.[2] We AFFIRM on both appeals.

---

1 All appellees will be referred to collectively as "appellees."

2 Debtor has filed a related appeal of an amended order confirming debtor's chapter 11 plan. (AZ-98-1410) A separate decision will issue in the appeal.

FACTS[3]

Debtor is a contractor. In 1982, he was the managing director of an Indian corporation that he owned, Consort Constructions Ltd. Alstom, a Swiss corporation, entered into a contract with the State Organization of Electricity of the Republic of Iraq to build power plants in Iraq.[4] Alstom then entered into two subcontracts with Consort for performance of the civil work on the projects. The subcontracts provided

---

3 Some of the undisputed background facts are taken from the parties' briefs and other pleadings and are not necessarily supported by evidence in the record

4. The contract was with Sprecher Energie, the predecessor to Alstom. For ease of reference, we will refer to the company throughout as Alstom. It is not clear from the record who the Sprecher Group appellees are. According to Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, etc., pp. 2-3, the Sprecher Group defendants are either companies that were predecessors to Alstom, are entities unrelated to Alstom, or are no longer in existence. Because all Sprecher appellees have asserted the same arguments, we will refer to them together.

that all disputes arising out of the contracts would be arbitrated by an arbitrator of the International Chamber of Commerce. (ICC)[5].

Work commenced on the projects in 1982. In December 1982, Alstom ordered Consort off the job because of alleged defects in performance. In a letter dated February 27, 1984, Alstom set out its understanding of the sums that were due to Consort for Consort's work and also the sums it asserted Consort owed it for alleged breaches of contract. (Ex. 4 to debtor's First Amended Disclosure Statement). Alstom claimed contract damages that exceeded the amount Alstom indicated it owed to Consort.

At some point, Consort assigned its claims against Alstom to debtor. Despite debtor's demand, Alstom has not

---

5 The contracts provide:

All disputes arising in connection with the present contract shall be finally settled and the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules. The contract shall be governed by Swiss law. (Complaint, Ex. 2 ¶ 14)

paid the amounts set out in the 1984 letter, because it asserts that any amounts it owes Consort are more than offset by amounts it alleges Consort owes for Consort's breach of contract.

An involuntary bankruptcy petition was filed against debtor in 1991. The court entered an order for relief in November 1991. In December 1992, Consort and debtor, as assignee of the claims of Consort, commenced an arbitration proceeding against Alstom before the ICC. (Debtor's July 1, 1993 Affidavit in Response to Motions to Dismiss, p. 7) Later in the same month debtor commenced adversary proceeding No. 92-1330 in bankruptcy court against Alstom and the Sprecher Group, seeking turnover of the amounts set out in Alstom's 1984 letter, pursuant to § 542,[6] as well as additional amounts as damages for alleged breach of the subcontracts.

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6 Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

He claims turnover for amounts he asserts are undisputed, and which he claims exceed the amount of any setoff Alstom might have.

In 1994, on appellees' request, the bankruptcy court stayed the adversary proceeding pending arbitration. Shortly thereafter, the ICC dismissed the arbitration proceeding based at least in part on debtor's failure to pay the necessary fees.

In August 1996, after there had been no action in the adversary proceeding for more than 18 months, the bankruptcy court entered an order to show cause why the adversary proceeding should not be dismissed for lack of prosecution. On November 5, the court held a hearing on the order to show cause. It deferred ruling, allowing debtor to file supplemental pleadings. In mid-December, he filed two proofs of claim in the bankruptcy case on behalf of Alstom, asserting claims for setoff against the amounts debtor asserts Alstom owes him for the work Consort did on the Iraqi projects. In February 1997, the court dismissed the adversary proceeding without

prejudice. It also granted Alstom's motion to withdraw the proofs of claim that debtor had filed on Alstom's behalf and denied debtor's motion to reconsider that ruling.

Debtor appeals.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re:	)	Case No. 91-10615-PHX-RTB
BALBIR SINGH TULI	)	
Debtor.	)	**AMENDED ORDER CONFIRMING PLAN**

The plan ("Debtor's Third Alternative, Modification of His First Amended Plan of Reorganization Dated 2/10/97, Consolidated 5/15/97, Submitted 7/7/97 After Incorporating Settlements Since Made Effected and Corrected, Reconsolidated 7/8/97 Without Materially and Adversely Affecting Any Class Already Voted") under Chapter 11 of the Bankruptcy Code filed on or about June 15, 1995, modified and/or amended December 5, 1996, December 31, 1996, February 10, 1997, May 15, 1997, July 7, 1997 and July 8, 1997, having been transmitted to creditors, and it having been

determined after hearing on notice that the requirements for confirmation set forth in 11 U.S.C. 1129(b) have been satisfied;

IT IS ORDERED THAT:

The Plan filed by the Debtor is confirmed.

Except as set forth below, the above-named Debtor is released from all dischargeable debts.

Any judgment heretofore obtained in any court other than this Court is null and void as a determination of personal liability of the Debtor with respect to any of the following:

Debts dischargeable under 11 U.S.C. 532(a);

Unless heretofore or hereafter determined by order of this Court to be nondischargeable, debts alleged to be excepted from discharge under 11 U.S.C. 523(a)(2), (4) and (6);

Debts determined by this Court to be discharged.

All creditors whose debts are discharged by this Order and all creditors whose judgments are declared null and void

above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named Debtor.

IT IS FURTHER ORDERED THAT:

Any and all claims, rights, privileges and remedies held by the Debtor against GEC Alstom T&D A.G. and GEC Alstom T&D, Inc. (f/k/a/ Sprecher Energie A.G.), Sprecher + Schuh, Ltd., (collectively, "GEC Alstom") and any and all claims, rights, privileges and remedies held by GEC Alstom against the Debtor shall in no way be altered, impaired or in any way affected by the Plan confirmed by this Order. Any conflict with this provision contained in Debtor's Plan shall be controlled by this Order.

IT IS FURTHER ORDERED THAT:

Any and all claims against and any and all assets of Consort Construction (97-01409-PHX-RTB) shall in no way be altered, impaired, administered or in any way affected by the Plan confirmed by this Order except as specifically ordered

by this Court.

IT IS FURTHER ORDERED THAT:

After confirmation and until this case is officially closed, dismissed or converted, the Debtor shall compoly with the requirements of 28 U.S.C. 1930(a)(6) by payment of quarterly fees to the United States Trustee, and shall file with the Court and supply to the United States Trustee the required monthly reports.

DATED: June 1, 1998.

(Signed)
HONORABLE REDFIELD T. BLUM
United States Bankruptcy Judge

Balbir Singh Tuli
4141 N. Scottsdale Rd.
Suite 110
Scottsdale, AZ 85251
(480) 990-0282

Debtor-in-Possession

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re	)
	) Case No. 91-10615-PHX-RTB
BALBIR SINGH TULI,	)
d/b/a Jewel of the Crown	) CHAPTER 11
Builders, a licensed and	) REORGANIZATION
bonded General Contractor	) PROCEEDINGS
(California license number	)
565968; Bond Number	)
669581; Employer I.D.	)
#458-65-2862,	)
	)
Debtor.	)

DEBTOR'S THIRD, ALTERNATIVE, MODIFICATION OF HIS FIRST AMENDED PLAN OR REORGANIZATION DATED 2/10/97. CONSOLIDATED 5/15/97. SUBMITTED 7/7/97 AFTER INCORPORATING SETTLEMENTS SINCE MADE/EFFECTED AND CORRECTED RE-CONSOLIDATED 7/8/97

WITHOUT MATERIALLY AND ADVERSELY AFFECTING ANY CLASS ALREADY VOTED

7.0.5. The major means of debtor's rehabilitation under the Plan, pursuant to 11 U.S.C. §§ 1123(1)(5), 1123(b)(3) & (6), are transfer/sale/retention of property of estate, including, but not limited to, claims, in accordance with the abovesaid Settlements incorporated herein, and adopted hereby. All claims of debtor and of the estate shall be retained and enforced by the debtor as the property of the estate. For the benefit of Consort's creditors through Consort's reorganization through Tuli's rehabilitation, Tuli shall prosecute BAP Appeals Nos. AZ-97-1124 and AZ-97-1421, and in the event BAP or Court of Appeals or U.S. Supreme Court permits, Tuli shall enforce his estate's claim of turnover under 11 U.S.C. § 542, as well as its claim of damages for willful violation of automatic stay under 11 U.S.C. § 362(h), by GEC Alstom.

ARTICLE XIV
DISCHARGE OF DEBTOR

14.01 Upon confirmation of the Plan and vesting of

all assets to the debtor, the debtor shall be discharged of all claims and liabilities arising prior to filing of the petition for relief, pursuant to 11 U.S.C. § 1141, except as otherwise provided by the order of confirmation. Confirmation of the Plan shall vest all property of the estate in the debtor, free and clear of all liens, encumbrances, and claims, except as otherwise provided in the Plan or the order confirming the Plan. Confirmation of the plan shall incorporate and adopt the settlements by the debtor with the creditors, referred to in the Plan. All the rights, claims and remedies of the estate shall be preserved by the Plan for enforcement by the debtor postconfirmation, for the benefit of creditors of Consort in case No. 97-01409-PHX-RTB through the reorganization of Consort through the rehabilitation of Tuli in this case No. 91-10615-PHX-RTB.

DATED this 7th day of July, 1997.

(Signed)

Balbir Singh Tuli

Balbir Singh Tuli
4705 N. 84th Place
Scottsdale, AZ 85251
(480) 990-0282
Attorney or Assisant or Representative for Debtor

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re -	)
	) Case No. 91-10615-PHX-RTB
BALBIR SINGH TULI,	)
d/b/a Jewel of the Crown	) CHAPTER 11 (Involuntary)
Builders, a California	)
General Contractor	) LIST OF CREDITORS
458-65-2862	) HOLDING 20 LARGEST
Debtor.	) UNSECURED CLAIMS

Sprecher & Schuh Holding, A.G. Buchserstrassse7, CH-5001 Aarau, Switzerland (Present name adopted on Jan. 1, 1986; Established in 1900 as Sprecher & Schuh, A.G.	Sprecher & Schuh, Inc. (U.S. Subsidiary of Sprecher & Schuh holding A.G. John Hamm. Pr. CEO 15503 W. Hardy Rd. Houston, TX 77060 (713) 931-7000 Fax (713) 931-9018 (Officer familiar with the claim: Josef. B. Kessler./ Christian Carl/ Ernst-Aug. Dittrich/ Jurg Hepfer)	Damages Claimed For alleged breach of Contracts by the Debtor's Assignor company Consort Construc-tions (P) Ltd of which Debtor is the Assignee

Property of any kind not otherwise scheduled:

1. Payment due for work done in Iraq for: Sprecher & Schuh, CH-5001, Aarau/ Switzerland $7,298,301

2. Damages claims for breach of contract by Sprecher & Schuh, CH-5001, Aarau/Switzerland $25,423,196

BANKRUPTCY CODE
(Relevant portions of certain sections)

§ 101. Definitions

In this title

(4) "claim" means —

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or

(B) right to an equitable remedy for breach of performance, if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(9) "creditor" means —

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h), or 502(i) of this title; or

(C) entity that has a community claim;

(11) "debt" means liability on a claim;

(33) "Lien" means charge against or interest in property to secure payment of a debt of performance of an obligation;

(50) "transfer" means every mode, direct or indirect, absolute or conditions, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

§ 102. Rules of construction. In this title —

(2) "claim against the debtor" includes claim against property of the debtor.

§ 103. Applicability of chapters.

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title.

(g) Except as provided in section 901 of this title, subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter.

(i) Chapter 13 of this title applies only in a case under such chapter.

§ 362. Automatic stay.

(a)...a petition filed under section 301, 302, or 303 of

this title,...operates as a stay, applicable to all entities, of —

(1) the commencement or continuation,...of a judicial, administrative, or other action or proceeding against the debtor,...or to recover a claim against the debtor that arose before the commencement of the case under this title;

(3) any act to exercise control over property of the estate;

(6) any act...to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor;

(c) Except as provided in subsections (d), (e), and (f) of this section —

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of —

(C) if the case is...a case under chapter 9, 11,...or

13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if —

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section —

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

§ 363. Use, sale, or lease of property.

(b) (1) The trustee, after notice and a hearing, may use, sell,...other than in the ordinary course of business, property of the estate.

(c) (1) If the business of the debtor is authorized to be operated under section...1108,...or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale...of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(d) The trustee may use, sell,...property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d),...of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold,...by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale...as is necessry to provide adequate protection of such interest.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(4) such interest is in bona fide dispute;

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(o) In any hearing under this section —

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

§ 501. Filing of proofs of claims or interests.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

§ 502. Allowance of claims or interests.

(a) A claim,...proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case..., objects.

(b) ...if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that —

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law...

§ 506. Determination of secured status.

(a) An allowed claim of a creditor...that is subject to setoff under section 553 of this title, is a secured claim...to the extent of the amount subject to setoff,...and is an unsecured claim to the extent that...the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless —

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under secion 501 of this title.

§ 524. Effect of discharge.

(a) A discharge in a case under this title —

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor,

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held;

(1) ...all legal or equitable interests of the debtor in property as of the commencement of the case.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate,...

(7) Any interest in property that the estate acquires after the commencement of the case.

§ 542. Turnover of property to the estate.

(a) ...an entity...in possession,...or control, during the case, of property that the trustee may use, sell,...under section 363 of this title,...shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b)...an entity that owes a debt that is property of the estate and that is matured,...shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

§ 554. Abandonment of property of the estate.

(a)...the trustee may abandon any property of the estate that is of inconsequential value and benefit to the estate.

(b)...the court may order the trustee to abandon any property of the estate...that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

§ 1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(b)(1)...if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable,....

(2)...the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale,...or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

§ 1325. Confirmation of plan.

(a)...the court shall confirm a plan if—

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title:

§ 1327. Effect of confirmation.

(c)...the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

(3)

No. 01-1174

Supreme Court, U.S.
FILED
MAR 14 2002

IN THE

Supreme Court of the United States

IN RE: BALBIR SINGH TULI,

Debtor.

BALBIR SINGH TULI,

Petitioner,

—v.—

SPRECHER ENERGIE A.G.; SPRECHER + SCHUH GROUP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ALSTOM (SCHWEIZ) AG AND ALSTOM, INC. IN OPPOSITION

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THE QUESTIONS PRESENTED FOR REVIEW

1. Is this an appropriate case for resolving an alleged conflict between the United States Courts of Appeals for the Third and Ninth Circuits concerning the interplay of Sections 553 and 1141 of the Bankruptcy Code (which respectively govern setoff rights and the effect of confirmation of a plan), when:

a) Section 1141 terminates creditors' rights in property covered by the plan "*except as otherwise provided . . . in the order confirming the plan*" (emphasis added);

b) The *Ninth Circuit*, in the case at bar, *affirmed* a *confirmation order that expressly carved out and preserved Respondents' setoff rights*; while, in marked contrast,

c) *No provision was made for setoff rights* in the plan, or the order confirming the plan, *in the allegedly conflicting Third Circuit case*;

d) The instant case involves (i) the discretion of the United States Bankruptcy Court for the District of Arizona, Phoenix Division (the "Bankruptcy Court") in fashioning an order confirming a plan, rather than (ii) determining (as the Third Circuit did) the impact of Section 553 on a final order confirming a plan; and

e) The Ninth Circuit decision is consistent with the "majority rule"?

2. Is there an actual "case or controversy" before this Court, since:

a) Petitioner has not sought review of the Ninth Circuit's affirmance of the Bankruptcy Court's dismissal, without prejudice, of Petitioner's adversary proceeding against the Respondents; and

b) Petitioner's claims against Respondents are now time-barred?

PARTIES TO THE PROCEEDING

The correct names of the Respondents are:

Alstom (Schweiz) AG (listed in the caption as "Sprecher Energie A.G."); Alstom, Inc.; and Swisslog Holding AG ("Swisslog") (listed in the caption as "Sprecher + Schuh Group").

Alstom (Schweiz) AG and Alstom, Inc. are both indirect subsidiaries of Alstom, a French corporation whose shares are publicly traded on the Paris stock exchange and whose depository receipts are publicly traded in the United States and the United Kingdom. There is only one shareholder, Franklin Resources, Inc., of San Mateo, California, reported to own 10% or more of Alstom's shares.

Swisslog is not a party to this Brief, and Alstom (Schweiz) AG and Alstom, Inc. have no knowledge or information concerning the ownership of Swisslog.

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STATEMENT OF THE CASE

In 1982, Sprecher Energie AG, a predecessor of Alstom (Schweiz) AG ("Alstom"), a Swiss corporation, awarded a written subcontract to Consort Constructions Ltd. ("Consort"), an Indian company, to perform certain civil engineering work in connection with Alstom's erection of a series of power plants for Iraq. (Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") June 9, 1999 Memorandum ("6/9/99 BAP Mem."), RA[1] 8.) When Consort failed to perform timely or satisfactorily, Alstom ordered Consort off the job. (*Id.* at RA 9.) Thereafter, Consort and Alstom exchanged letters in which each asserted that the other had breached the subcontract. (*Id.*)

A. The Adversary Proceeding

An involuntary bankruptcy petition was filed against Petitioner in 1991 and the Bankruptcy Court entered an order of relief that same year. (*Id.*)

In December 1992, Petitioner, who claimed to be an assignee of Consort, commenced arbitration against Alstom before the International Chamber of Commerce ("ICC") in Paris, seeking damages for Alstom's allegedly wrongful termination of the subcontract. The same month, Petitioner commenced an adversary proceeding (the "Adversary Proceeding") in the Bankruptcy Court against (i) Alstom, (ii) Alstom, Inc. (a U.S. affiliate of Alstom), and (iii) Swisslog, an unrelated company, alleging essentially the same claims as the ones asserted in the ICC arbitration. (*Id.* at RA 9-10.)

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[1] Citations to Petitioner's Appendix are preceded by the letter "A". Citations to these Respondents' Appendix are preceded by the letters "RA".

Alstom moved to dismiss the Adversary Proceeding on various grounds, including that the subcontract provided for binding ICC arbitration of all claims between Consort (Petitioner's purported assignor) and Alstom. The Bankruptcy Court, after a number of hearings and extensive briefing by the parties, in April 1994 ultimately stayed the Adversary Proceeding pending ICC arbitration. (*Id.* at RA 10.)[2]

Later in 1994, the ICC dismissed the arbitration because Petitioner failed to pay his share of the fees of the ICC and the arbitrators. More than two years later, the Bankruptcy Court *sua sponte* issued an order to show cause why the Adversary Proceeding should not be dismissed for failure to prosecute. In February 1997, after repeated warnings, the Bankruptcy Court dismissed the Adversary Proceeding, without prejudice, for, *inter alia*, failure to prosecute. (*Id.* at RA 10.) Petitioner appealed to the BAP, which affirmed the Bankruptcy Court's dismissal order. (*Id.* at RA 22.)

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[2] Petitioner is in error when he asserts, in paragraph 2 of his Concise Statement of the Case, that the Bankruptcy Court stayed the Adversary Proceeding to "allow Alstom . . . and other respondents to discharge their onus to establish their claims to setoff in any court or arbitration". The Bankruptcy Judge, during a hearing held on July 21, 1993, stated that he was "probably leaning in the direction of directing arbitration under the contract" because: "One, that's what's in the contract. That's what was agreed to. Two, this case probably deals with a lot of Swiss law, and if we were to try it, probably an awful lot of the witnesses aren't even in the United States, and so you've got legitimate forum nonconvenience problems for at least some of the parties, maybe all of the parties, you have a judge who has never read Swiss law, certainly never looked at the extent Iraqi law would be applicable for any reason, . . . [w]e have one of the heaviest case loads in the country right here . . . and I think this case would put a real strain on us." (Adversary Proceeding Dkt. Entry No. 158 (Transcript of July 21, 1993 Hearing, pp. 19-20).)

B. The Proofs of Claim

In 1996, Petitioner filed two proofs of claim in the Bankruptcy Court, against himself, purportedly on Alstom's behalf, but without Alstom's knowledge or consent. (Memorandum Decision of the United States Court of Appeals for the Ninth Circuit ("9th Cir. Mem."), RA 4.) Petitioner's unauthorized filing was another attempt by Petitioner to do indirectly that which the Bankruptcy Court had prohibited him from doing directly, namely, litigating in the Bankruptcy Court his claims against Alstom arising out of Consort's subcontract for civil engineering work in Iraq. (June 30, 1999 BAP Memorandum ("6/30/99 BAP Mem."), RA 25.) Alstom moved to strike or, in the alternative, to withdraw the unauthorized proofs of claim, because Alstom's position has consistently been that any disputes between Petitioner and Alstom could be resolved only through ICC arbitration, as provided in Alstom's contract with Consort, Petitioner's alleged assignor. The Bankruptcy Court granted Alstom's motion to withdraw the proofs of claim. The BAP affirmed, on the ground that Petitioner had failed "to demonstrate that withdrawal of the claims would cause him any prejudice." (6/9/99 BAP Mem.), RA 20.)

C. The Amended Confirmation Order

Notwithstanding (i) the dismissal of the Adversary Proceeding and the ICC arbitration and (ii) the Bankruptcy Court's warning to Petitioner that "it would not approve any plan of reorganization that deprived [the Alstom Respondents] of their right to contest whether they owed money to [Petitioner]" (6/30/99 BAP Mem., RA 26), Petitioner filed a plan of reorganization that, *inter alia*, purported to "confirm" Petitioner's right to sums that he claimed Alstom owed Petitioner under the

subcontract with Consort. At Alstom's request, the Bankruptcy Court duly amended the order confirming the plan to equally preserve (i) any claims that Alstom had against Petitioner, as well as (ii) any claims that Petitioner had against Alstom. (*Id.*) Petitioner appealed to the BAP, which affirmed the Bankruptcy Court's order. (6/30/99 BAP Mem.), RA 33.)

D. The Ninth Circuit Decision

Petitioner appealed to the Ninth Circuit, which affirmed the Bankruptcy Court's (i) dismissal of the Adversary Proceeding, (ii) amendment of the confirmation order, and (iii) withdrawal of Alstom's proofs of claim. (9th Cir. Mem., RA 2.)

The Petition seeks review only of the amended confirmation order, with the result, *inter alia*, that the Bankruptcy Court's orders dismissing the Adversary Proceeding and the proofs of claims are now final and no longer appealable.

ARGUMENT

A grant of *certiorari* would be improvident because: (i) on the facts of this case, there is no conflict between the Third and Ninth Circuits' decisions on the interplay between Bankruptcy Code Sections 1141 and 553; (ii) the Ninth Circuit's decision in the instant case is consistent with the "majority rule"; and (iii) any "ruling" by this Court on the merits of Petitioner's claims would merely be an "advisory opinion", because the setoff issue is mooted by Petitioner's failure to seek review of the Ninth Circuit's affirmance of the Bankruptcy Court's dismissal of the Adversary Proceeding.

A. On the facts of this case, there is no actual conflict between the decisions of the Third and Ninth Circuits

A review of the text of Bankruptcy Code Section 1141 and the decisions of (i) the Third Circuit in *United States v. Continental Airlines (In re Continental Airlines)*, 134 F.3d 536 (3d Cir.), *cert. denied*, 525 U.S. 929 (1998), and *Megafoods Stores, Inc. v. Flagstaff Realty Assoc. (In re Flagstaff Realty Assoc.)*, 60 F.3d 1031 (3d Cir. 1995), and (ii) the Ninth Circuit in the case at bar and in *Carolco Television Inc. v. National Broad. Co. (In re DeLaurentiis Entertainment Group Inc.)*, 963 F.2d 1269 (9th Cir.), *cert. denied*, 506 U.S. 918 (1992), on which it is based, readily shows there is no conflict between the Circuits on the facts of the instant case.

1. Section 1141 expressly provides that the terms of the confirmation order govern the respective rights and obligations of the debtor and his creditors.

Section 1141 of the Bankruptcy Code expressly provides that the terms of the plan take precedence over any general rules concerning the consequences of confirmation. Thus, for example, Section 1141 (a) states that "the provisions of a confirmed plan" bind both the debtor and any creditor. Subsection (b) provides that:

> *Except as otherwise provided in the plan or the order confirming the plan*, the confirmation of a plan vests all of the property of the estate in the debtor. (Emphasis added.)

Similarly, Section 1141 (c) states:

> *[E]xcept as otherwise provided in the plan or in the order confirming the plan,* after confirmation of a plan, the property dealt with by the plan is free and

clear of all claims and interests of creditors . . .[3] (Emphasis added.)

In the instant case, the amended "order confirming the plan" expressly provided:

> *Any and all claims, rights, privileges and remedies held by the Debtor against GEC Alsthom* T&D A.G. and GEC Alstom T&D, Inc. (f/k/a Sprecher Energie A.G.), Sprecher + Schuh, Ltd., Sprecher + Schuh Holding A.G., and Sprecher + Schuh, Inc. (collectively, "GEC Alsthom") *and any and all claims, rights, privileges and remedies held by GEC Alsthom against the Debtor shall in no way be altered, impaired or in any way affected by the Plan confirmed by this Order.* Any conflict with this provision contained in Debtor's Plan shall be controlled by this order. (Amended Order Confirming Plan RA 35.) (Emphasis added.)

In short, the amended confirmation order "carved out" from the operation of the Plan the claims and counterclaims (including setoff rights) of Petitioner and Alstom vis-à-vis one another. Including such a provision in the amended order was well within the Bankruptcy Court's discretion. Under Section 1129(a)(3) of the Bankruptcy Code, the operative standard is whether a plan is in "good faith". *See Perry Arden v. Motel Partners (In re Perry Arden)*, 176 F.3d 1226, 1228 (9th Cir. 1999) ("[W]e review for an abuse of discretion the decision to approve a claim compromise as part of a plan . . . ")

This "carve out" was also entirely consistent with the Bankruptcy Court's repeated rulings that those claims

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[3] Subsection (d)'s grant of a discharge to the debtor is also "*[e]xcept as otherwise provided . . . in the order confirming the plan . . .*"

and counterclaims should be arbitrated before the ICC, in accordance with the terms of the subcontract between Alstom and Consort. (*See, e.g.* Adversary Proceeding Dkt. Entry Nos. 101 (Minute Entry dated March 28, 1994) and 133 (Minute Entry dated January 10, 1997).)

2. Whatever the general positions of the Third and Ninth Circuits may be as to the relative priority of Code Sections 1141 and 553, on the facts of this case there is no "conflict" between those Circuits

While both the Third and Ninth Circuits have, in *dicta*, made broad pronouncements as to which of Sections 1141 and 553 should govern if their provisions conflict, their actual decisions are narrowly grounded on the facts.

Indeed, in *Continental Airlines*, the Third Circuit stressed that "the material facts [of the Ninth Circuit's decision] in *DeLaurentiis* distinguish it from the case before us." 134 F.3d at 541. In *DeLaurentiis*, the creditor timely made its setoff claim known to the Bankruptcy Court, the debtor and other creditors before confirmation took place. In marked contrast, in *Continental Airlines*, "the plan of reorganization proceeded on the justifiable assumption that the reorganized debtor faced no set-off claim." *Id.* Moreover, in *Continental Airlines*, "the plan, without objection by the affected creditor, *expressly prohibit[ed] setoff without the debtor's approval.*" 8 COLLIER ON BANKRUPTCY ("COLLIER'S") ¶ 1141.02[3] at 1141-7 (15th ed. revised 2001) (emphasis added).)

The narrow limits of applicability of *Continental Airlines* are vividly illustrated by the Third Circuit's decision, only three years earlier, in *Megafoods Stores, Inc. v. Flagstaff Realty Assoc. (In re Flagstaff Realty Assoc.)*, 60 F.3d 1031 (3d Cir. 1995). There a commercial tenant

that had made repairs to the premises when the landlord breached its obligation to do so, was permitted to recoup[4] its expenditures from future rent obligations after the landlord declared bankruptcy, despite the tenant's failure to object to the plan or appeal confirmation. Further, in *Flagstaff*, the Third Circuit cited with approval *DeLaurentiis* and other cases in which setoff was permitted post confirmation. 60 F.3d at 1036. Since the Court of Appeals in *Continental Airlines* did not even refer to *Flagstaff* (let alone seek to distinguish it), it would appear that it saw no conflict between its two decisions.

In the instant case, unlike *Continental Airlines,* no party could claim ignorance of Alstom's position that (i) it had substantial defenses (including a right of setoff) to the Adversary Proceeding, but (ii) the ICC was the appropriate and exclusive forum for the resolution of all such claims and counterclaims. Alstom repeatedly asserted that position (and Petitioner vigorously opposed it) from the inception of the Adversary Proceeding until the Bankruptcy Court issued its amended order confirming the Plan.

Moreover, the Bankruptcy Court, prior to the confirmation of the Plan, repeatedly ruled that Petitioner's and Alstom's claims and counterclaims against one another had to be adjudicated in another forum. (*See, e.g.* Adversary Proceeding Dkt. Entry Nos. 101 (Minute Entry dated March 28, 1994) and 133 (Minute Entry dated January 10, 1997).)

Consequently, the Ninth Circuit, in the instant case, was not confronted with a situation like that which trou-

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[4] The distinction that the Court of Appeals for the Third Circuit drew between "setoff" and "recoupment" is irrelevant, in the case at bar, since Alstom's claims arise out of the same transaction and contracts as Consort's (and thus Petitioner's) claims against Alstom.

bled the Third Circuit in *Continental Airlines*, 134 F.3d at 542, where a post-confirmation assertion of a setoff right "ha[d] a probability of disrupting the plan of reorganization" or might "unnecessarily protract the bankruptcy proceedings and consume judicial resources" or be "unfair to other creditors and the debtor."

3. The instant case is also distinguishable because, unlike the allegedly conflicting Third Circuit decision, it involves the Bankruptcy Court's discretion in approving a Plan

In the case at bar, the Bankruptcy Court was charged, pursuant to Section 1129(a) of the Bankruptcy Code, with responsibility for determining whether the Petitioner's Plan met the statutory requirements. The issue that was before the Ninth Circuit, on Petitioner's appeal from the Bankruptcy Court's confirmation order, was whether the Bankruptcy Judge abused his discretion in carving out from the Plan an unresolved dispute between the Petitioner and Alstom. *See, e.g., In the Matter of Madison Hotel Assoc.*, 749 F.2d 410, 425 (7th Cir. 1984) ("[T]he court looks to the debtor's plan and determines, in light of the particular facts and circumstances, whether the plan will fairly achieve a result consistent with the Bankruptcy Code . . . The bankruptcy judge is in the best position to assess the good faith of the parties' proposals.") (Citations omitted.); c*f. Perry Arden,* 176 F.3d at 1228 (approval of a compromise of a claim reviewed under an "abuse of discretion" standard).

In marked contrast, the issue before the Third Circuit in *Continental Airlines* was whether to permit a pre-bankruptcy creditor to assert, for the first time, *after confirmation*, a right of setoff when (a) there was no provision for such a setoff in the Plan or the order confirming the Plan and (b) allowance of the setoff may have

adversely impacted other pre-bankruptcy creditors that had no notice of the claim at the time of confirmation.

Thus the instant case is not an appropriate vehicle for resolving any differences that may exist between the Third and Ninth Circuits concerning the interplay of Sections 553 and 1141 of the Bankruptcy Code.

4. The Ninth Circuit's decision is consistent with the "majority rule"

In any event, to the extent that the two Circuits do differ as to the relative priority of Sections 1141 and 553, the Ninth Circuit's construction of the interplay of the Bankruptcy Code's provisions is consistent with the view taken by most courts. *See* 5 COLLIER'S ¶ 553.08[1] ("A majority of the courts that have addressed the issue answer that confirmation and discharge do not prohibit the defensive use of setoff in a subsequent action by the debtor.") (Citations omitted); 8 COLLIER'S ¶ 1141.02[3] ("Courts have disagreed on whether a right of setoff survives confirmation and can be used when a creditor is sued by a former debtor; the trend, however, is in favor of the survival of setoff rights.")

B. This Court should also deny *certiorari* because the purported "conflict" is now moot

An additional reason to deny *certiorari* is that at this time the Court could only issue an "advisory opinion", since there effectively is no remaining "case" or "controversy" between the parties.

Although the Bankruptcy Court dismissed the Adversary Proceeding without prejudice, and Petitioner appealed the dismissal to the BAP and then to the Court of Appeals (both of which affirmed the Bankruptcy Court's order), Petitioner did not ask this Court to review the dismissal order. Consequently, that order

became final and Petitioner no longer has a pending proceeding against Alstom.

Thus, Petitioner's claim against Alstom for purportedly breaching a 1982 subcontract with Consort is time-barred. Under the law of Arizona, where the Adversary Proceeding was pending, the longest potentially applicable Statute of Limitations is eight years. Ariz.Rev.Stat. § 12-552. However, nineteen years have now passed since the alleged breach purportedly occurred.

Since a dismissal without prejudice "leaves the parties in the same legal position as if no suit had ever been filed," *Hilbrun v. Goldberg*, 823 F.2d 881, 883 (5th Cir. 1987), *cert. denied,* 485 U.S. 962 (1988), "the statute of limitations is deemed not to have been suspended during the period in which the suit was pending." *Moore v. St. Louis Music Supply Co., Inc.*, 539 F.2d 1191, 1194 (8th Cir. 1976). *See also*, 8 MOORE'S FEDERAL PRACTICE, ¶41.50[7][b] (3d ed. revised 2001) ("When the district court elects to dismiss an action without prejudice under Rule 41(b), the dismissal leaves the parties in the same legal position as if no suit had been filed. As a consequence, the statute of limitations is not tolled by the filing of the original suit.") (Citations omitted.)

In addition, as more than six months have elapsed from August 30, 2001, the date when the mandate of the Court of Appeals for the Ninth Circuit issued (A 18), Petitioner can no longer commence a new action under the "savings provisions" of Section 12-504(a) of the Arizona Revised Statutes.[5]

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[5] "If an action timely commenced is terminated by . . . dismissal for lack of prosecution, the court *in its discretion* may provide a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired. Such period shall not exceed six months from the date of termination.") (Emphasis added.) (RA 37.)

Consequently, due to Petitioner's failure to preserve his challenge to the Bankruptcy Court's dismissal of the Adversary Proceeding, any resolution by this Court of the alleged conflict between the Third and Ninth Circuits will have no effect on Petitioner's claims against Alstom.

CONCLUSION

The petition for *certiorari* should be denied because, on the facts of this case, there is no conflict between the Third and Ninth Circuits. Moreover, the Ninth Circuit's decision is consistent with the "majority rule". Further, the underlying dispute between the parties is now moot, since: (a) Petitioner's claims have been dismissed, without prejudice; (b) Petitioner failed to seek review by this Court of the Ninth Circuit's affirmance of the Bankruptcy Court's dismissal of those claims; and (c), as a result, Petitioner's claims are now time-barred.

Dated: New York, New York
March 15, 2002

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-16871
99-16910

BAP Nos. AZ-97-01124-PRMe
AZ-97-01421-PRMe
(Consolidated)

AZ-98-1410-PRMe
(Related)

In re: BALBIR SINGH TULI,

Debtor.

BALBIR SINGH TULI,

Appellant,

—v.—

SPRECHER ENERGIE A.G.; SPRECHER + SCHUH GROUP,

Appellees.

Appeals from the Ninth Circuit
Bankruptcy Appellate Panel
PERRIS, RUSSELL, and MEYERS,
Bankruptcy Judges, Presiding

Submitted June 11, 2001*
San Francisco, California

MEMORANDUM**

Before:
HILL,*** GRABER, and MCKEOWN,
Circuit Judges.

Plaintiff Balbir Singh Tuli appeals pro se three orders of the bankruptcy court, relating to an adversary proceeding that he instituted against two Swiss companies. The Bankruptcy Appellate Panel (BAP) affirmed, as do we.

1. *Dismissal Without Prejudice of Plaintiff's Adversary Claim*

In 1992, Plaintiff commenced an arbitration against Defendants before the International Chamber of Commerce (ICC) in Paris, as required by the relevant subcontracts for work on an Iraqi power station. A few weeks later, he filed an adversary proceeding against

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The Honorable James C. Hill, Senior Circuit Judge for the Eleventh Circuit, sitting by designation.

Defendants in bankruptcy court, pertaining to the same subcontracts.

In 1997, the bankruptcy court dismissed the adversary proceeding without prejudice. One of the alternative grounds for dismissal was failure to prosecute.

The bankruptcy court did not abuse its discretion. The ICC dismissed the arbitration in 1994, in part because Plaintiff had not paid the required fees. He did not restart the arbitration. Later in 1994, the bankruptcy court told Plaintiff that he had to file a motion to vacate the stay if he wanted to resume the adversary proceeding. He had not done so for 20 months when the bankruptcy court entered an order to show cause why the adversary proceedings should not be dismissed for failure to prosecute.

Plaintiff's main argument is that the bankruptcy court did not dismiss for failure to prosecute, but only abstained under 28 U.S.C. § 1334(c)(1). We read the court's order, however, as dismissing the proceeding on two independent and alternative grounds, one of which was failure to prosecute. That ground for dismissal was proper in the circumstances.

2. *Interlocutory Orders*

Plaintiff also challenges three interlocutory orders pertaining to the adversary proceeding. We agree with the BAP that such orders may not be reviewed when the appeal is from a dismissal without prejudice for lack of prosecution. *Ash v. Cvetkov*, 739 F.2d 493, 497-98 (9th Cir. 1984).

3. *Defendants' Motion to Amend*

In 1998, the bankruptcy court confirmed Plaintiff's plan under Chapter 11. The order preserved all claims that Plaintiff had against Defendants. Defendants moved

to amend the order to clarify that, if Plaintiff eventually recovers damages under the Iraqi subcontracts, then Defendants' claims for setoffs against those damages are preserved. The court made that amendment, which Plaintiff now disputes.

Specifically, he argues that any setoff was discharged automatically when the plan was confirmed. To the contrary, this court has held that, under 11 U.S.C. § 553(a), pre-petition rights to a setoff (like those that Defendants assert here) survive the general discharge of debts that occurs, under 11 U.S.C. § 1141, when a plan is confirmed. *Carolco Television, Inc. v. Nat'l Broad. Co. (In re De Lauerentiis Entm't Group Inc.)*, 963 F.2d 1269, 1276 (9th Cir. 1992).

Plaintiff argues that Defendants' generally bad conduct during the course of this long-running dispute should create an exception to the rule in § 553(a). That statute contains three exceptions, none of which is implicated here, and none of which supports Plaintiff's theory. Accordingly, the amendment was permissible.

4. *Withdrawal of Proofs of Claim*

In 1996, Plaintiff filed two proofs of claim in bankruptcy court, against himself and on behalf of Defendants, without Defendants' knowledge or consent. The bankruptcy court granted Defendants' motion to withdraw those claims.

At the time Plaintiff filed the proofs of claim, the adversary proceeding to which they referred was stayed so that the parties could arbitrate their dispute before the ICC. Thus, the proofs of claim relate to debts that were not before the bankruptcy court at the time they were

filed. In the circumstances, Plaintiff could not have been prejudiced, and the bankruptcy court did not abuse its discretion in allowing Defendants to withdraw the proofs of claim.

AFFIRMED.

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

BAP Nos. AZ-97-1124-PRMe
AZ-97-1421-PRMe
(Consolidated)

Bk. No. 91-10615-PHX-RTB

Adv. No. 92-1330

In re: BALBIR SINGH TULI,

Debtor.

BALBIR SINGH TULI,

Appellant,

—v.—

SPRECHER ENERGIE A.G., now known as GEC ALSTHOM T&D A.G. and GEC ALSTHOM T&D, INC.; SPRECHER + SCHUH HOLDING A.G.; SPRECHER + SCHUH LTD.; SPRECHER + SCHUH, INC. (SPRECHER + SCHUH GROUP)

Appellees.

MEMORANDUM[1]

Argued and Submitted on May 20, 1999
at Phoenix, Arizona

Filed – June 9, 1999

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Redfield T. Baum,
Bankruptcy Judge, Presiding

Before:

PERRIS, RUSSELL and MEYERS,
Bankruptcy Judges.

Debtor appeals an order dismissing an adversary proceeding he filed in his bankruptcy case (AZ-97-1124) and an order allowing withdrawal of proofs of claim debtor filed on behalf of appellees Sprecher + Schuh Holding A.G., Sprecher + Schuh, Ltd. and Sprecher + Schuh, Inc. (Sprecher Group) and GEC Alstom T&D, A.G. and GEC Alstom, Inc. (Alstom)[2] (AZ-97-1421).

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 13 and Circuit Rule 36-3.

[2] All appellees will be referred to collectively as "appellees."

Both orders relate to a dispute regarding a 1982 contract for the construction of a power plant in Iraq. The result of the court's orders was to require that any adjudication of that dispute take place in arbitration or in a court other than the bankruptcy court. The two appeals have been consolidated.[3] We AFFIRM on both appeals.

FACTS[4]

Debtor is a contractor. In 1982, he was the managing director of an Indian corporation that he owned, Consort Constructions Ltd. Alstom, a Swiss corporation, entered into a contract with the State Organization of Electricity of the Republic of Iraq to build power plants in Iraq.[5] Alstom then entered into two subcontracts with Consort for performance of the civil work on the projects. The subcontracts provided that all disputes arising out of the

---

[3] Debtor has filed a related appeal of an amended order confirming debtor's chapter 11 plan. (AZ-98-1410) A separate decision will issue in that appeal.

[4] Some of the undisputed background facts are taken from the parties' briefs and other pleadings and are not necessarily supported by evidence in the record.

[5] The contract was with Sprecher Energie, the predecessor to Alstom. For ease of reference, we will refer to the company throughout as Alstom.

It is not clear from the record who the Sprecher Group appellees are. According to Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, etc., pp. 2-3, the Sprecher Group defendants are either companies that were predecessors to Alstom, are entities unrelated to Alstom, or are no longer in existence. Because all Sprecher appellees have asserted the same arguments, we will refer to them together.

contracts would be arbitrated by an arbitrator of the International Chamber of Commerce (ICC).[6]

Work commenced on the projects in 1982. In December 1982, Alstom ordered Consort off the job because of alleged defects in performance. In a letter dated February 27, 1984, Alstom set out its understanding of the sums that were due to Consort for Consort's work and also the sums it asserted Consort owed it for alleged breaches of contract. (Ex. 4 to debtor's First Amended Disclosure Statement) Alstom claimed contract damages that exceeded the amount Alstom indicated it owed to Consort.

At some point, Consort assigned its claims against Alstom to debtor. Despite debtor's demand, Alstom has not paid the amounts set out in the 1984 letter, because it asserts that any amounts it owes Consort are more than offset by amounts it alleges Consort owes for Consort's breach of contract.

An involuntary bankruptcy petition was filed against debtor in 1991. The court entered an order for relief in November 1991. In December 1992, Consort and debtor, as assignee of the claims of Consort, commenced an arbitration proceeding against Alstom before the ICC. (Debtor's July 1, 1993 Affidavit in Response to Motions to Dismiss, p. 7) Later in the same month debtor commenced adversary proceeding No. 92-1330 in

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[6] The contracts provide:

> All disputes arising in connection with the present contract shall be finally settled and the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules.
>
> The contract shall be governed by Swiss law.

(Complaint, Ex. 2 ¶ 14)

bankruptcy court against Alstom, and the Sprecher Group, seeking turnover of the amounts set out in Alstom's 1984 letter, pursuant to § 542,[7] as well as additional amounts as damages for alleged breach of the subcontracts. He claims turnover for amounts he asserts are undisputed, and which he claims exceed the amount of any setoff Alstom might have.

In 1994, on appellees' request, the bankruptcy court stayed the adversary proceeding pending arbitration. Shortly thereafter, the ICC dismissed the arbitration proceeding based at least in part on debtor's failure to pay the necessary fees.

In August 1996, after there had been no action in the adversary proceeding for more than 18 months, the bankruptcy court entered an order to show cause why the adversary proceeding should not be dismissed for lack of prosecution. On November 5, the court held a hearing on the order to show cause. It deferred ruling, allowing debtor to file supplemental pleadings. In mid-December, he filed two proofs of claim in the bankruptcy case on behalf of Alstom, asserting claims for set off against the amounts debtor asserts Alstom owes him for the work Consort did on the Iraqi projects. In February 1997, the court dismissed the adversary proceeding without prejudice. It also granted Alstom's motion to withdraw the proofs of claim that debtor had filed on Alstom's behalf and denied debtor's motion to reconsider that ruling.

Debtor appeals.

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[7] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

APPEAL NO. AZ-97-1124

ISSUE

Whether the bankruptcy court abused its discretion in dismissing adversary proceeding No. 92-1330 without prejudice.

STANDARD OF REVIEW

The panel reviews a bankruptcy court's dismissal for failure to prosecute for an abuse of discretion. *Oliva v. Sullivan*, 958 F.2d 272, 274 (9th Cir. 1992); *In re Osinga*, 91 B.R. 893, 894 (9th Cir. BAP 1988).

DISCUSSION

1. *Order dismissing adversary proceeding*

In the court's January 10, 1997, minute entry/order, it concluded that debtor had not timely pursued arbitration, "including but not necessarily limited to payment of required fees." It also said:

> The merits of this dispute relate to an Iraqi construction project with the other parties to the dispute conducting business in Europe and not in the District of Arizona. The only basis for invoking this court's jurisdiction is the jurisdictional grant under 28 U.S.C. § 1334.
>
> This court again concludes that these disputes should be arbitrated. Further, the court also concludes that "in the interests of justice" as that term is used in Section 1334(c)(1) this court should abstain from hearing these disputes thereby allowing these parties, including the debtor, to litigate

> their claims in whatever court may have jurisdiction over them. Therefore, this adversary proceeding should be dismissed, without prejudice.

The court entered an order dismissing the proceeding, consistent with the minute entry/order.

Although debtor argues that the complaint was not dismissed for lack of prosecution,[8] the court's minute entry states two alternative bases for dismissal: lack of prosecution and abstention. We will affirm if there is support in the record for either alternative.

A court has inherent authority to dismiss *sua sponte* for lack of prosecution. *Osinga*, 91 B.R. at 894. In determining whether to dismiss for that reason, the court must consider five factors: (1) the public's interest in an expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on the merits; and (5) the availability of less drastic sanctions. *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986); *Osinga*, 91 B.R. at 894. There must also be a showing unreasonable delay. *Henderson*, 779 F.2d at 1423. The court is not required to make explicit findings on the various factors. *Id.* Where, as here, the court does not explicitly consider the factors, the appellate court reviews the record independently to determine whether there was an abuse of discretion. *Osinga*, 91 B.R. at 894.

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[8] Debtor asserts that the dismissal for lack of prosecution was really a stay pending arbitration. At the time it ruled, the court had before it a *sua sponte* order to show cause why the case should not be dismissed for lack of prosecution. The court also noted in the order of dismissal that there were pending motions to dismiss, which included motions to abstain. The adversary proceeding had previously been stayed pending arbitration; that stay had never been dissolved. The court's minute entry/order makes it clear that the alternative bases for dismissal were lack of prosecution and abstention.

The bankruptcy court's decision will not be disturbed unless the reviewing court is left with the definite and firm conviction that the court committed a clear error of judgment after weighing the relevant factors. *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994). Dismissal is a drastic sanction that should be imposed only in extreme circumstances. *Oliva v. Sullivan*, 958 F.2d at 273.

A. *Expeditious resolution of litigation*

In order for a court to dismiss for failure to prosecute, there must be unreasonable delay. The reviewing court gives deference to the trial court to determine what is unreasonable. *Eisen*, 31 F.3d at 1451.

Although the bankruptcy court did not make any specific finding, the record amply supports a conclusion that the delay was unreasonable and that the delay interfered with the expeditious resolution of the proceeding. This adversary proceeding was filed in December 1992. Within 30 days, appellees filed motions to dismiss, abstain, or to stay pending arbitration. Those motions were not resolved until April 1994, due to numerous supplemental briefs and extensions of time to file documents, as well as debtor's attempts to compel discovery with regard to his response to the motions to dismiss. The court granted the stay pending arbitration in April 1994, and debtor appealed. The appeal was dismissed as interlocutory in September 1994. In the meantime, the pending ICC arbitration was dismissed due in part debtor's failure to pay the required fee.

The court held a status conference on December 6, 1994 at debtor's request, at which the court told debtor that he should file a motion to vacate the stay if that was what he wanted to do, in light of the dismissal of the ICC arbitration. (Transcript of December 6, 1994 hear-

ing, pp. 6, 8, 10) Debtor did not take any action to vacate the stay at that time. There was no other activity until the order to show cause issued on August 14, 1996.

The absence of any activity for more than a year and a half is an unreasonable delay. The case had been pending for more than four years when it was dismissed. Debtor claims that he was unable to arbitrate because he lacked the funds to move forward with the arbitration and that he needed an adjudication of the turnover action in order to obtain the funds for arbitration of the remaining claims. He asserted that he did not file a motion to vacate the stay, despite the court's urging, because he thought the court was too busy to hear this proceeding and because it was too late to file a motion to withdraw reference. He represented that he decided to seek funds elsewhere to pay for the arbitration, including pursuing other adversary proceedings. *Id.*

Even assuming that debtor did not have sufficient funds to pursue arbitration,[9] a plaintiff's financial difficulties do not excuse a plaintiff's delay. *Malone v. U.S. Postal Service*, 833 F.2d 128 (9th Cir. 1987); *Eisen*, 31 F.3d at 1452. Nor does debtor's belief that he could not file a motion to vacate the stay, in light of the court's specific invitation to do that, or his choice to pursue other litigation in lieu of pursuing this proceeding.

Debtor belatedly filed a motion to vacate the stay pending arbitration and motion for summary judgment after the order to show cause issued. That motion does not weigh against dismissal. Debtor cannot use actions after the show cause order issued as evidence of diligence in prosecuting the action. *Eisen*, 31 F.3d at 1452.

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[9] It is not clear from the record that debtor in fact lacked the funds to arbitrate.

Based on the more than four-year pendency of the proceeding without a significant move toward resolution, and debtor's failure to provide an adequate excuse for the delay, there was an unreasonable delay that weighs in favor of dismissal.

B. *Need to manage court's docket*

This factor is usually reviewed in connection with the public's interest in an expeditious resolution of the dispute to determine whether the delay was unreasonable. The reviewing court defers to the trial court because it is better aware when its docket may become unmanageable. *Eisen*, 31 F.3d at 1452.

In this case, the adversary proceeding had been pending more than four years when it was dismissed. This factor weighs in favor of dismissal.

C. *Risk of prejudice to defendants*

Failure to prosecute diligently is sufficient in itself to justify dismissal, even in the absence of actual prejudice to the defendants. Prejudice is assumed from unreasonable delay. The presumption of prejudice is rebuttable. *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976); *Eisen*, 31 F.3d at 1452.

The dispute in this case arose in 1984. Debtor filed his adversary proceeding in 1992. The case then languished in the bankruptcy court, despite dismissal of the arbitration action, for more than four years. Debtor does not assert any facts that would rebut the presumption of prejudice.

D. *Disposition of cases on their merits*

The policy favoring disposition of cases on their merits is weighed against the delay and prejudice to the

defendants. The court is not to consider the merits of the underlying case. *Eisen*, 31 F.3d at 1454. It is the responsibility of the plaintiff to move the case toward disposition at a reasonable pace. *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir. 1991). Debtor did not move this case toward disposition at either the bankruptcy court or the arbitration level.

E. *Availability of less drastic sanctions*

A court must make a reasonable exploration of possible and meaningful alternatives to dismissal. *Morris*, 942 F.2d at 652. However, the Ninth Circuit has never required an explicit discussion of alternative sanctions before for an order of dismissal can be upheld. *Eisen*, 31 F.3d at 1454 "[U]nder egregious circumstances, it is unnecessary (although helpful) for the trial court to discuss why alternatives to dismissal are infeasible." *Osinga*, 91 B.R. at 895; *Eisen*, 31 F.3d at 1454.

The circumstances of this case, including the age of the case at dismissal, the lack of progress toward resolution, and the complete lack of activity for more than 18 months, are egregious, so there is no need for a discussion of alternatives to dismissal. Further, from those circumstances it appears that the court was well within its range of discretion in dismissing for lack of prosecution.

The court acted within its discretion in dismissing the adversary proceeding for lack of prosecution. Thus, we affirm the dismissal on this basis and need not consider the alternative abstention basis for dismissal.

2. *Other orders*

Debtor seeks review of three other orders in this appeal of the order of dismissal: the November 14, 1993 order denying debtor's motion to compel depositions in

the adversary proceeding; the April 21, 1994 order granting appellees' motion to stay the adversary proceeding pending arbitration; and the January 17, 1997 order denying confirmation of debtor's plan of reorganization. Appellees argue that those orders are not reviewable in an appeal from a dismissal for lack of prosecution.

The general rule is that interlocutory rulings that are unappealable merge into a final judgment and are reviewable in an appeal from the final judgment. *Ash v, Cvetkov*, 739 F.2d 493, 497 (9th Cir. 1984). The Ninth Circuit has held that the general rule should not apply when the case has been dismissed without prejudice for lack of prosecution: "[I]nterlocutory rulings do not merge into a judgment of dismissal without prejudice for failure to prosecute whether the failure to prosecute is purposeful or is a result of negligence or mistake." *Id.* at 498. The court reasons that allowing review of otherwise unappealable orders would encourage litigants who obtain unfavorable interlocutory rulings to fail to prosecute and let the case be dismissed for lack of prosecution, thereby obtaining review of otherwise unreviewable orders. *Id.* at 497. If there is good cause for reviving the case after a dismissal for lack of prosecution, the entire case will be revived, thereby also reviving the appealability of interlocutory orders once a final judgment is entered. *Al-Torki v. Kaempen*, 78 F.3d 1381, 1386 (9th Cir. 1996).

In view of the policies supporting appellate courts' refusal to review interlocutory orders after a dismissal for lack of prosecution, we decline to review the two interlocutory orders that were entered in the adversary proceeding, which are the order denying debtor's motion to compel depositions and the order staying the proceeding pending arbitration. The third order, the order

denying confirmation of debtor's plan, was entered in debtor's main bankruptcy case, not in the adversary proceeding. An order in the main bankruptcy case would not merge with the judgment of dismissal in the adversary proceeding, regardless of the reason for dismissal. The order was entered on January 22, 1997, and debtor's notice of appeal was filed on February 18, 1997. The appeal of the order is therefore untimely, and we cannot review it. *See In re Crystal Sands Properties*, 84 B.R. 665 (9th Cir. BAP 1988) (a timely notice of appeal is jurisdictional).

APPEAL NO. 97-1421

ISSUES

1. Whether the bankruptcy court abused its discretion in allowing Alstom to withdraw the proofs of claim debtor filed on Alstom's behalf.

2. Whether the bankruptcy court abused its discretion in denying reconsideration of the order granting Alstom's motion to withdraw the proofs of claim.

STANDARD OF REVIEW

A court's decision to allow withdrawal of proofs of claim is reviewed for abuse of discretion. *In re Lowenschuss*, 67 F.3d 1394, 1399 (9th Cir. 1995). The panel reviews a court's denial of a motion for reconsideration for abuse of discretion. *In re Nunez*, 196 B.R. 150, 155 (9th Cir. BAP 1996); *In re Negrete*, 183 B.R. 195, 197 (9th Cir. BAP 1995), *aff'd* 103 F.3d 139 (9th Cir. 1996) (table); *In re Sandoval*, 186 B.R. 490, 493 (9th Cir. BAP 1995).

DISCUSSION

Debtor appeals the order allowing withdrawal of proofs of claim he filed on behalf of Alstom and of the order denying reconsideration of that order. Alstom argues that, because the minute entry/order granting its motion was not a final, appealable order, the panel may review only the order denying debtor's motion for reconsideration of that order.

Where, as here, a motion for reconsideration is filed before entry of an order or judgment, the motion is treated as one to amend a judgment under Fed. R. Civ. P. 59. *See In re Crystal Sands Properties*, 84 B.R. at 668 n.3. In examining the denial of a motion to amend a judgment, the appellate court may review both the denial of the motion as well as the underlying order. *Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir. 1989).

Alstom is correct that, at the time the notice of appeal was filed, the court had announced its decision on the motion to strike or withdraw, but had not entered a final order.[10] After the briefs were submitted in this appeal, the panel issued an order requiring Alstom to lodge an order disposing of the motion to strike or withdraw proofs of claim. The order was lodged on April 21, 1999, and the court entered the order allowing withdrawal of the proofs of claim on April 28, 1999. Therefore, because the bankruptcy court has now entered a final order granting the motion to withdraw proofs of claim, debtor is entitled to review of the merits of both the original order and the order denying reconsideration.

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[10] Alstom's motion was in the alternative, asking either to strike the proofs of claim or to allow their withdrawal. The court's final order made clear that it was allowing withdrawal.

1. *Order allowing Alstom to withdraw the proofs of claim debtor filed on their behalf*

Fed. R. Bankr. P. 3006 provides that a creditor may not withdraw a claim "except on order of the court after hearing on notice to the trustee or debtor in possession . . . ."[11] In deciding whether to grant a creditor's request to withdraw a claim, the court is governed by the same considerations that underlie Fed. R. Civ. P. 41(a)(2), relating to voluntary dismissals of complaints. *Lowenschuss*, 67 F.3d at 1399. The court should allow withdrawal unless the debtor will suffer some legal prejudice as a result of the withdrawal. *Id.* The inconvenience of defending another lawsuit does not constitute prejudice. *Id.* at 1400.

Although the rule does not specifically allow a creditor who has had a claim filed on the creditor's behalf to withdraw that claim, a creditor should have at least as much right to withdraw a proof of claim filed by a debtor on its behalf as it would to withdraw a proof of claim it filed itself. Debtors would not be harmed by such a rule, because they could block withdrawal by showing prejudice.

Debtor objected to the claims that he filed on Alstom's behalf, but he did not argue or try to demonstrate that withdrawal of the claims would cause him any prejudice. Nor is prejudice apparent from the record.

Debtor argued to the bankruptcy court that his proof of claim should stand because it was based on an informal proof of claim filed by Alstom.

Documents that "state an explicit demand showing the nature and amount of the claim against the estate, and evidence an intent to hold the debtor liable" can

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[11] The rule also provides that a creditor may withdraw a claim as of right under certain circumstances. No one argues that those circumstances exist in this case.

constitute informal proofs of claim. *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 815 (9th Cir. 1985). Debtor referred to two of Alstom's pleadings as their informal proof of claim: a Memorandum of Points and Authorities appended to debtor's Expedited Motion to Extend Deadline for Plan Confirmation, and Document #100 in the adversary proceeding, which is Alstom's Reply Memorandum in Support of the Motion to Strike Plaintiff's 11/29/93 Notice.

Even assuming that the pleadings to which debtor refers meet the requirements for an informal proof of claim, debtor does not explain why Alstom would be prevented from withdrawing that informal proof of claim. Nor is there any reason why a creditor should be prohibited from withdrawing an informal proof of claim under circumstances that would support withdrawal of a formal proof of claim. Because debtor did not demonstrate any prejudice, the bankruptcy court did not abuse its discretion in allowing withdrawal of the debtor-filed proofs of claim.[12]

2. *Motion for reconsideration*

Debtor appeals the order denying reconsideration of the court's order granting Alstom's motion to withdraw proofs of claim, but does not present any argument with regard to that order. His motion for reconsideration was in response to the court's suggestion at the hearing on

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[12] Debtor asserts that the court abused its discretion in failing to sustain his objections to the claims that he filed on Alstom's behalf. In light of the bankruptcy court's ruling on Alstom's motion to withdraw the proofs of claims, any objections to those claims were moot. Further, even if the claims were deemed disallowed because Alstom failed to respond timely to debtor's objections, the court could have considered Alstom's motion as one to reconsider the disallowance of the claims under Fed. R. Bankr. P. 3008.

the motion that, if debtor had more authorities he wanted the court to consider, he should submit them in a motion for reconsideration. The motion for reconsideration merely cited cases without any argument.

A party seeking to amend a judgment under Fed. R. Civ. P. 59(e) must raise one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence; or (3) the need to correct a clear error of law or prevent manifest injustice. *All Hawaii Tours Corp. v. Polynesian Cultural Center,* 116 F.R.D. 645, 649 (D. Haw. 1987), *rev'd on other grounds*, 855 F.2d 860 (9th Cir. 1988). Debtor's motion reargued the law but did not show any clear error of law.[13] The court did not abuse its discretion in denying his motion for reconsideration.

CONCLUSION

In Appeal No. AZ-97-1124, the bankruptcy court did not abuse its discretion in dismissing the adversary proceeding without prejudice, based on a lack of prosecution. In Appeal No. AZ-97-1421, the court did not err in allowing Alstom to withdraw the proofs of claim that debtor filed on Alstom's behalf or in denying reconsideration of that order. We therefore AFFIRM in both appeals.

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[13] The cases debtor cited dealt with the court's jurisdiction over claims, the right to jury trials in bankruptcy proceedings, and withdrawal of claims as a matter of right under Fed. R. Bankr. P. 3006. None showed that the court committed an error of law by allowing withdrawal of the proofs of claim.

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

BAP No. AZ-97-1410-PRMe
Bk. No. 91-10615-PHX-RTB

In re: BALBIR SINGH TULI,

Debtor.

BALBIR SINGH TULI,

Appellant,

—v.—

SPRECHER ENERGIE A.G., now known as GEC ALSTHOM T&D A.G. and GEC ALSTHOM T&D, INC.; SPRECHER + SCHUH LTD.; SPRECHER + SCHUH HOLDING A.G.; SPRECHER + SCHUH, INC.,

Appellees.

MEMORANDUM[1]

Argued and Submitted on May 20, 1999
at Phoenix, Arizona

Filed – June 30, 1999

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Redfield T. Baum,
Bankruptcy Judge, Presiding

Before:

PERRIS, RUSSELL and MEYERS,
Bankruptcy Judges.

Debtor Balbir Singh Tuli (debtor) appeals an amended order confirming his chapter 11[2] plan of reorganization. He asserts that the bankruptcy court erred in adding language to the confirmation order that carved out claims by and against appellees GEC Alstom A.G. and GEC Alstom T&D, Inc. (Alstom) and Sprecher + Schuh, Ltd.,

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 13 and Circuit Rule 36-3.

[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

Sprecher + Schuh Holding A.G. and Sprecher + Schuh, Inc. (Sprecher)[3] from the effect of the plan and from discharge. We AFFIRM.

FACTS

Debtor, who is a contractor, has been engaged for some years in a dispute with appellees with regard to a contract to build power plants in Iraq in the early 1980's. The facts relating to that dispute are more completely set out in our unpublished decision in two consolidated appeals, BAP No. AZ-97-1124 and AZ-97-1421. For purposes of this appeal, it is enough to say that debtor asserts that appellees owe him money for work he performed on the construction project, and appellees assert that any amounts they owe debtor are more than set off by amounts they assert debtor owes them. After an involuntary chapter 11 petition was filed against debtor in 1991, debtor commenced an adversary proceeding in an effort to obtain a determination of those disputes. The bankruptcy court stayed the proceeding pending arbitration before the International Chamber of Commerce (ICC), based on an arbitration provision in the contracts. The dispute was never arbitrated, and in 1997, the court dismissed the adversary proceeding for lack of prosecution. Debtor then filed proofs of claim on behalf of Alstom, apparently attempting to get the bankruptcy court to determine the claims in the context of the main bankruptcy case, despite the court's earlier determination that the claims should be arbitrated. The bankruptcy court allowed Alstom's motion to withdraw those proofs of claim. Debtor's appeal of the order dismissing the adversary proceeding for lack of prosecution and the

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[3] We refer to Alstom and Sprecher collectively as "appellees."

order allowing withdrawal of proofs of claim are disposed of in a separate Memorandum decision issued on June 9, 1999.

The court advised debtor that it would not approve any plan of reorganization that deprived appellees of their right to contest whether they owed money to debtor. On June 3, 1998, the court confirmed debtor's chapter 11 plan. Debtor submitted an order for the court's signature that provided that debtor was discharged of all dischargable debts, and preserved all claims by debtor against appellees. The court entered the order, and Alstom moved to amend the order to also preserve its claims against debtor. The bankruptcy court entered an amended order, which excepted from debtor's discharge any debt owed to appellees and preserved appellees' claims against debtor.

Debtor appeals. He asks that the Panel modify the amended order confirming the plan to delete language that preserves claims held by appellees against debtor.

ISSUES

1. Whether the appeal is moot.

2. Whether the bankruptcy court abused its discretion in granting Alstom's motion to amend the order confirming the plan to include language carving out the claims by and against appellees from the effect of the plan.[4]

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[4] The motion to amend was filed by Alstom. The amended order carves out the claims of all appellees, and all appellees argue for affirmance of the order.

STANDARD OF REVIEW

The Panel reviews a court's ruling on a motion to amend pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e) for abuse of discretion. *In re Sandoval*, 186 B.R. 470, 493 (9th Cir. BAP 1995).

DISCUSSION

1. *The appeal is not moot.*

Sprecher filed a motion to dismiss based on mootness, which remains pending. An appeal becomes moot "when the appellant fails to obtain a stay pending appeal and events occur which prevent the court from fashioning effective relief." *In re Beatty*, 162 B.R. 853, 856 (9th Cir. BAP 1994). An appeal of a plan confirmation order may become moot if a party opposing the plan failed to obtain a stay pending appeal, and the plan has been carried out to substantial culmination, *In re Arnold & Baker Farms*, 85 F.3d 1415, 1419 (9th Cir. 1996), or the rights of third parties have intervened. *In re Spirtos*, 992 F.2d 1004, 1006 (9th Cir. 1993). Effective relief is impossible if funds have been disbursed to non-parties or if the failure to obtain a stay has permitted such a comprehensive change of circumstances as to make it inequitable to consider the merits of the appeal. *E.g.*, *Beatty*, 162 B.R. at 856; *In re Blumer*, 66 B.R. 109, 113 (9th Cir. BAP 1986), *aff'd* 826 F.2d 1069 (9th Cir. 1987) (table). The burden is on the moving party to demonstrate that the appeal is moot. *In re Pintlar Corp.*, 124 F.3d 1310 (9th Cir. 1997); *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994).

Debtor did not obtain a stay pending appeal. Exhibits D and E to Sprecher's motion to dismiss show that debtor has distributed approximately $122,000 pursuant

to the plan. Real property in Louisiana apparently has been transferred or is awaiting transfer pending the parish clerk's deletion of mortgages from the records. Sprecher argues that this evidence shows that the plan has been substantially consummated and that the rights of third parties have intervened, therefore the appeal of the order confirming the plan is moot.

Sprecher has failed to show that debtor's transfer of property or payment of claims of third parties would preclude the Panel from fashioning effective relief in this case. Although debtor appeals the amended order confirming the plan, he does not challenge confirmation of the plan, of which he was the proponent. Instead, debtor challenges the language that the court added in response to Alstom's motion to amend the order, which carves out from the effect of the plan the rights and claims of all appellees against debtor. In substance, he is challenging the court's allowance of Alstom's motion to amend the order confirming the plan. If we conclude that the court erred in granting that motion by adding the disputed language, we can fashion effective relief on appeal by deleting the language about which debtor complains.[5] Sprecher has not shown that deletion of the carve-out language would have any effect on the other creditors or the distributions and transactions that have occurred pursuant to the plan. We conclude that the appeal is not moot, and deny the motion to dismiss.

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[5] In its Reply to Appellant's Response to the Motion to Dismiss, Sprecher argues that the Panel has authority only to reverse the order confirming the plan, not to modify it by striking particular language. Fed. R. Bankr. P. 8013 provides that the "bankruptcy appellate panel may affirm, *modify*, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." (Emphasis supplied.) The plain language of Rule 8013 supports a modification if the appeal warrants it.

2. *The bankruptcy court did not abuse its discretion in granting Alstom's motion to amend the order confirming the plan.*

Debtor argues that the court erred in carving out from discharge and from the effect of the plan any claims appellees have against debtor. Although his argument is not clear, he appears to assert that the court could not except those claims from his discharge without an adversary proceeding,[6] and that Alstom has lost its claims to setoff by failing to obtain a determination of those rights and by its inequitable conduct in the bankruptcy case.

Section 1141(d)(1)(A) provides that, except as otherwise provided in the plan or in the order confirming the plan, confirmation of a plan "discharges the debtor from any debt that arose before the date of such confirmation . . . ." That provision gives the court authority to approve a plan that carves out specified claims from the general discharge set out in § 1141(d).

The bankruptcy court did not abuse its discretion in carving out any claims to setoff that appellees might have against debtor. Although the language of the amended order confirming the plan is very broad and could be read to preserve claims against debtor personally, we asked counsel at oral argument whether appellees asserted any claims against debtor personally or whether their claims were limited to claims of setoff. Counsel for Alstom said that he could not respond without consulting with his client. After oral argument, we entered an order requiring appellees to advise the Panel whether they would stipulate that the language of the

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[6] Fed. R. Bankr. P. 7001 provides that a proceeding to determine the dischargeability of a debt must be brought as an adversary proceeding.

order should be interpreted to preserve only claims to a right to setoff. Counsel for both appellees have responded with stipulations that the reservation of rights included in the amended order confirming the plan should be interpreted as reserving only their right, if any, to setoff and not as including any right to affirmative relief against debtor. Pursuant to that stipulated interpretation of the amended order, the only claims preserved are claims of setoff.

Section 553(a) provides that, with exceptions not relevant here,

> this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . . .

The Ninth Circuit has held that a creditor's rights to setoff survive a § 1141 discharge. In *In re De Laurentiis Entertainment Group, Inc.*, 963 F.2d 1269 (9th Cir. 1992), the debtor filed a plan of reorganization, which was confirmed, under which a new entity, Carolco Television, Inc. (CTI), acquired the rights of the debtor to a claim for $1.25 million against the National Broadcasting Co. (NBC). During the debtor's bankruptcy case, NBC had asserted a right to setoff against that claim for a $1.6 million debt it claimed the debtor owed to NBC. The plan of reorganization provided that the debtor's right to the $1.25 million claim against NBC was transferred "free and clear" of all prebankruptcy interests not listed in the plan. Although NBC's $1.6 million claim was not listed in the plan, NBC did not object to the plan or contest the order confirming the plan. *Id.* at 1271.

CTI sued NBC on the prebankruptcy debt, and NBC asserted its claim as a setoff against the debt. CTI objected to the setoff claim, arguing that the debt had been discharged when the plan was confirmed.

The court considered the apparent conflict between § 1141, which provides that property dealt with by the plan is free and clear of all claims and interests of creditors, and that the order confirming the plan discharges the debtor from debts that arose before confirmation, and § 553(a), which "protects the right to a setoff from the operation of the remainder of the bankruptcy code." *Id.* at 1274. The court concluded:

> [S]ection 553 must take precedence over section 1141. In reaching this conclusion, we rely not only on . . . persuasive authority, but also on the language and structure of section 553 and the policies which underlie it. Section 553 provides that, with listed exceptions not relevant here, "this title does not affect the right of any creditor to offset a mutual debt . . . ." This language not only establishes a right to setoffs in bankruptcy, subject to enumerated exceptions, but seems intended to control notwithstanding any other provision of the Bankruptcy Code. To give section 1141 precedence would ignore this language.

Id. at 1276. The court also recognized that

> the primacy of setoffs is essential to the equitable treatment of creditors. A setoff is allowed as a defense to a claim brought by the debtor against a creditor. The creditor can claim only an amount large enough to offset its debt; it cannot collect anything from the debtor. Absent a setoff, a creditor . . . is in the worst of both worlds: it must pay its debt to the debtor in full, but is only entitled to

> receive a tiny fraction of the money the debtor owes it. It was to avoid this unfairness to creditors that setoffs were allowed in bankruptcy in the first place.

Id. at 1277.

Under that holding, § 553(a) automatically preserved any right appellees had to set off their claims against amounts debtor asserts appellees owe him. The court's addition of language providing that debtor's discharge does not cover appellee's claims, and that the claims by and against debtor are preserved, merely clarified the effect of § 553(a) on the claims of these parties. Adding that language was not an abuse of discretion.

Further, the bankruptcy court in 1994 had ordered that the dispute between debtor and appellees be resolved through arbitration before the ICC. The court made it clear to debtor on numerous occasions that the claims should be resolved in a forum other than the bankruptcy court. The bankruptcy court did not abuse its discretion in using the carve-out language in the amended order confirming the plan to implement its earlier orders requiring that the claims be resolved outside the bankruptcy process. *See* § 105(a).

Debtor also argues that Alstom lost any right to setoff by failing to obtain a determination of its claims and by what debtor asserts was Alstom's inequitable conduct in the case. Any argument regarding Alstom's loss of setoff rights should be addressed to and resolved by the tribunal that adjudicates the contract dispute between these parties.

CONCLUSION

This appeal is not moot, because it challenges only the language added to the order confirming the plan, and the Panel could fashion effective relief. The bankruptcy court did not abuse its discretion in amending the order confirming the plan to preserve the setoff claims of appellees against debtor. As appellees have stipulated, the amended order does not permit appellees to seek affirmative relief against debtor. We AFFIRM.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

Filed June 1, 1998

Case No. 91-10615-PHX-RTB

Chapter 11

In Re: BALBIR SINGH TULI,

Debtor.

AMENDED ORDER CONFIRMING PLAN

The plan ("Debtor's Third Alternative, Modification of His First Amended Plan of Reorganization Dated 2/10/97, Consolidated 5/15/97, Submitted 7/7/97 After Incorporating Settlements Since Made Effected and Corrected, Reconsolidated 7/8/97 Without Materially and Adversely Affecting Any Class Already Voted") under Chapter 11 of the Bankruptcy Code filed on or about June 15, 1995, modified and/or amended December 5, 1996, December 31, 1996, February 10, 1997, May 15, 1997, July 7, 1997 and July 8, 1997, having been transmitted to creditors, and it having been determined after hearing on notice that the requirements for confirmation set forth in 11 U.S.C. 1129(b) have been satisfied;

IT IS ORDERED THAT:

The Plan filed by the Debtor is confirmed.

Except as set forth below, the above-named Debtor is released from all dischargeable debts.

Any judgment heretofore obtained in any court other than this Court is null and void as a determination of personal liability of the Debtor with respect to any of the following:

Debts dischargeable under 11 U.S.C. 532(a);

Unless heretofore or hereafter determined by order of this Court to be nondischargeable, debts alleged to be excepted from discharge under 11 U.S.C. 523(a)(2),(4) and (6);

Debts determined by this Court to be discharged.

All creditors whose debts are discharged by this Order and all creditors whose judgments are declared null and void above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named Debtor.

IT IS FURTHER ORDERED THAT:

Any and all claims, rights, privileges and remedies held by the Debtor against GEC Alsthom T&D A.G. and GEC Alsthom T&D, Inc. (f/k/a Sprecher Energie A.G.), Sprecher + Schuh, Ltd., Sprecher + Schuh Holding A.G., and Sprecher + Schuh, Inc. (collectively, "GEC Alsthom") and any and all claims, rights, privileges and remedies held by GEC Alsthom against the Debtor shall in no way be altered, impaired or in any way affected by the Plan confirmed by this Order. Any conflict with this provision contained in Debtor's Plan shall be controlled by this order.

IT IS FURTHER ORDERED THAT:

Any and all claims against and any and all assets of Consort Construction (97-01409-PHX-RTB) shall in no way be altered, impaired, administered or in any way affected by the Plan confirmed by this Order except as specifically ordered by this Court.

IT IS FURTHER ORDERED THAT:

After confirmation and until this case is officially closed, dismissed or converted, the Debtor shall comply with the requirements of 28 U.S.C. 1930(a)(6) by payment of quarterly fees to the United States Trustee, and shall file with the Court and supply to the United States Trustee the required monthly reports.

DATED: June 1, 1998.

HONORABLE REDFIELD T. BAUM
HONORABLE REDFIELD T. BAUM
United States Bankruptcy Judge

Arizona Revised Statutes § 12-504 (2001)

§ 12-504. Saving of action timely commenced; defense or counterclaim; improper plaintiff; applicability

A. If an action is commenced within the time limited for the action, and the action is terminated in any manner other than by abatement, voluntary dismissal, dismissal for lack of prosecution or a final judgment on the merits, the plaintiff, or a successor or personal representative, may commence a new action for the same cause after the expiration of the time so limited and within six months after such termination. If an action timely commenced is terminated by abatement, voluntary dismissal by order of the court or dismissal for lack of prosecution, the court in its discretion may provide a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired. Such period shall not exceed six months from the date of termination.

B. The provisions of subsection A apply to judgments on appeal. The date of issuance of the mandate by the appellate court constitutes the date of termination of the action for the purposes of computing the time limited for commencement of the new action.

C. If a new action on the same cause of action is commenced by the plaintiff, his successor or his personal representative, the assertion of any cause of action or defense by the defendant in the new action is timely if it was or could have been timely asserted in the prior action.

D. If an action timely commenced is dismissed because the named plaintiff is not the proper party to bring the action, the provisions of this section apply to an action subsequently brought by the proper party, pro-

vided that the dismissed action was sufficient to put the defendant on notice of the claim sought to be asserted.

E. The provisions of this section are applicable to actions terminated by orders of dismissal entered on or after the effective date of this section.

(4)

No. 01-1174

Supreme Court, U.S.
FILED
APR 9 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BALBIR SINGH TULI,

Petitioner,

vs.

SPRECHER ENERGIE A.G.;
SPRECHER + SCHUH GROUP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

BALBIR SINGH TULI
7373 E. Scottsdale Mall, Suite 1
Scottsdale, Arizona 85251
(480) 949-8000

Pro Se Petitioner
as the representative of his Chapter 11
Bankruptcy Estate retained by his confirmed
Plan of Reorganization

14pp

QUESTIONS PRESENTED FOR REVIEW
(Re: Respondents' Brief)

1. Whether questions 1 and 2 presented by respondents' Brief for review are misfounded?

2. Whether the issues raised by respondents' Brief are frivolous on the face of the record?

3. Whether issues now raised by respondents' Brief, not decided by the Court of Appeals, need not be decided by the Supreme Court?

4. Whether respondents be estopped under the doctrines of judicial or equitable estoppel, from taking positions inconsistent with those taken below?

5. Whether respondents' Brief should be stricken for misstatements, especially of the "undisputed background facts" noted by the BAP in Memorandum of 6/9/99 (RA 8)?

6. Whether respondents' Brief misstates the effect of the two orders (dismissal without prejudice of adversary proceeding, and withdrawal of filed Proofs of Claim) not appealed to the Supreme Court, as time-barring petitioner's claims and rendering the petition for a writ of certiorari moot?

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I. RESPONDENTS' QUESTION NUMBER 1, IS MISFOUNDED.

1. In the Court of Appeals, respondents sought affirmation of Bankruptcy Court's addition of "carve-out" language in Amended Order Confirming Plan (Dkt. 383) on the following basis on which Bankruptcy Appellate Panel earlier affirmed it, i.e., the impact of 11 U.S.C. § 553(a) on § 1141(c), based on the Court of Appeals' prior interpretation in *In re De Laurentiis Entm't Group Inc.*, 963 F.2d 1269, 1275, 1276 (9th Cir.1992), and its conclusion that "section 553 must take precedence over section 1141," in answering the question presented by that case, i.e., "We must decide which of the two Code sections [553(a) and 1141(c)] controls [after confirmation of chapter 11 plan]." The Court of Appeals in its decision (Item 3, RA 3-4) in this case, accepted the following basis argued by respondents in their Brief at 25 and, based solely thereon, affirmed the carve-out:

> Relying upon the Ninth Circuit's holding in [In re] *De Laurentiis*, the BAP held that Bankruptcy Code *§ 553(a) automatically preserved the right the Alstom Group had to setoff their claims against amounts Debtor asserts they owe him.* It further held that the *Bankruptcy Court's addition of language* providing that Debtor's discharge "does not cover Appellee's claims, and that the claims by and against Debtor are preserved, *merely clarified the effect of § 553(a) on the claims of these parties.*"

Alstom's Brief in Court of Appeals, at 25. Also stating in footnote 5, as follows, in the Brief at 25:

> Because the language of the amended order confirming the plan could be read to preserve claims against Debtor personally, counsel for all appellees [respondents], at the request of the BAP, have stipulated that the "carveout" language should be interpreted as reserving only their right, if any, to setoff and not as including any right to affirmative relief against Debtor.

2. The Court of Appeals' decision in this case (Item 3, RA 3-4, Memorandum) treats the carve-out language in Order Confirming Plan, as a mere clarification of the impact of 11 U.S.C. § 553(a) as interpreted by it in *In re De Laurentiis* case, as follows:

> Defendants moved to amend the Order [Confirming Plan] *to clarify that,* if Plaintiff eventually recovers damages under the Iraqi subcontracts, then *Defendants' claims for setoffs* against those damages *are preserved. The Court made that amendment,* which Plaintiff now disputes. Specifically, he argues that any setoff was discharged automatically when the plan was confirmed. To the contrary, *this court has held that, under 11 U.S.C. § 553(a), pre-petition rights to a setoff (like those that Defendants assert here) survive the general discharge of debts that occurs, under 11 U.S.C. § 1141, when a plan is confirmed. Carolco Television, Inc. v. Nat'l Broad. Co. (In re De Laurentiis Entm't Group, Inc.),* 963 F.2d 1269, 1276 (9th Cir.1992).

Memorandum of Court of Appeals, RA 3-4, Item 3.

3. Therefore, on the facts of this case, the carve-out language in the Amended Order Confirming Plan "merely clarified the effect of § 553(a) on the claims of these parties," as argued by respondents in the Court of Appeals, based on this basis of affirmation by the BAP.

4. To the contrary, Question No. 1 raised by respondents to question the appropriateness of this case for resolving conflict between the Third and the Ninth Circuits in dealing with the tension between 11 U.S.C. §§ 553(a) and 1141(c), wrongly views the carve-out language in Order confirming plan as not merely a clarification of impact of § 553(a) on effect of plan confirmation under § 1141, but as exception to the effect of plan confirmation under the discretionary power of bankruptcy court.

5. Question No. 1 is not only misfounded, but also misleading and clearly frivolous.

6. Moreover, in their attempt to push this frivolous contention, respondents try to make a case which was

never their case in the courts below, by their now abandoning "setoff" which they claimed in courts below, and invoking "recoupment" in this Court for the first time by misstatement of even "the undisputed background facts," to which footnote 4 at RA 8 (Memorandum of the BAP, dated June 9, 1999) refers, as shown in II, below.

7. Respondents are thus raising issues on which the Court of Appeals did not pass, and this Court need not decide here issues not decided below, and may decline. *Green Tree Financial Corp. v. Randolph*, 121 S.Ct. 513, 523, n. 7 (2000) ("The Court of Appeals did not pass on this question, and we need not decide here issues not decided below."). In any event, the doctrine of recoupment is inapplicable because in the Claim stated by Alstom's predecessor in the 1984 letter referred to in undisputed background facts noted by the BAP, including present claim of setoff of its admitted indebtedness of specific amounts of cash security money and progress payment due petitioner's predecessor for work performed and approved and accepted by the client on different projects and under different contracts against consolidated claim of damages pertaining to four projects under the two subcontracts, which is clear from the said undisputed facts read with disclosures in First Amended Disclosure Statement, pp.11-21 (Dkt. 167), Ex.4 thereto referred to by the BAP in the undisputed facts, including petitioner's declaration under penalty of perjury on p.21 thereof, as to the truth of the facts stated in it.

8. Alstom by referring to its predecessor's above-said 1984 letter making a claim to setoff, opposed turnover of admitted dues of petitioner in the bankruptcy court by their pleading (Adv.dkt. 100), claiming setoff right under 11 U.S.C. § 553, as under:

> [A]s obvious on the face of the February 27, 1984 letter, Sprecher Energie has counterclaims against Consort that far exceed the allegedly "admitted" portion of Tuli's claim. Under Section 553 of the [Bankruptcy] Code, Sprecher

> Energie is entitled to setoff against Consort, his purported assignor.

Respondents' claim of right to setoff (Adv.dkt. 100).

9. Respondents admit on bankruptcy court's record that determination of the said setoff claim against the dues of petitioner under the two contracts, is critical to the rehabilitation through reorganization of Tuli and Consort in their Chapter 11 proceedings, as under:

> Lastly and most importantly, the alleged assignment and settlement of purported Consort claim against GEC Alsthom [now "Alstom"] is critical to both chapter 11 bankruptcy proceedings.

Respondents' Motion to transfer Consort's case (Dkt. 295).

10. Alstom asserts claim to setoff Tuli's claim to work dues being the major means of rehabilitation of Tuli and Consort's reorganization/payment of creditors, under the Confirmed Plan of Reorganization (A 33). And contrary to the provisions of ¶¶ 7.0.5 and 14.01 of confirmed Plan (A 33), respondents' Brief at 8-9 says that the post-confirmation assertion of setoff right by them does not have probability of disrupting the plan of reorganization or possibility of unnecessarily delaying bankruptcy proceedings and consuming judicial resources or being unfair to other creditors and the debtor. Assertion of setoff claim post-confirmation is disruptive to Plan.

II. RESPONDENTS' BRIEF MISSTATES "UNDISPUTED FACTS" STATED IN BAP MEMORANDUM AS "FACTS" (RA 8-10).

11. Footnote 4 to the BAP Memorandum of 6/9/99 (RA 8) refers to following "undisputed" FACTS:

> Alstom then entered into *two subcontracts* with Consort for performance of civil work on the *projects*. . . . Work commenced on the *projects* . . . Alstom ordered Consort off the job because of *alleged defects* in performance. In a *letter dated February 27, 1984, Alstom set out its understanding of the sums that were due to Consort*

> *for Consort's work and also the sums it asserted Consort owed it* for alleged breaches of contract. (Ex. 4 to debtor's First Amended Disclosure Statement). Alstom claimed contract damages that exceeded *the amount Alstom indicated it owed to Consort.* At some point, Consort assigned its claims against Alstom to debtor. Despite debtor's demand, *Alstom has not paid the amounts set out in the 1984 letter, because it asserts that any amounts it owes Consort are more than offset by amounts it alleges Consort owes* for Consort's breach of contract. . . . In December 1992, . . . debtor *commenced adversary proceeding* No. 92-1330 in bankruptcy court . . . *seeking turnover of the amounts set out in Alstom's 1984 letter, pursuant to § 542 [of Bankruptcy Code],* as well as additional amounts as damages for alleged breach of the *subcontracts. He claims turnover for amounts he asserts are undisputed, and which he claims exceed the amount of any setoff Alstom might have.* . . . In mid-December, [1996] he filed two proofs of claim in the bankruptcy case on behalf of Alstom, asserting claims for setoff against the amounts debtor asserts Alstom owes him for the work Consort did on Iraqi *projects.* In February 1997, the court dismissed the adversary proceeding without prejudice. It also granted Alstom's motion to withdraw the proofs of claim that debtor had filed on Alstom's behalf and denied debtor's motion to reconsider that ruling.

III. RESPONDENTS' QUESTION NUMBER 2 IS MISFOUNDED; THEY MISSTATE EFFECT OF UNAPPEALED ORDERS.

12. The effect of the two orders, stated by the BAP in its Memorandum of 6/9/99 (RA 8), is as follows:

> The result of the court's orders was to require that any adjudication of that dispute take place in arbitration or in a court other than the bankruptcy court.

13. The above statement of the BAP is based on the following orders of the bankruptcy court, as also the grounds taken by Alstom to obtain withdrawal of proofs of claim and to oppose vacation of stay:

> . . . ORDERED that the above-captioned adversary proceeding and all actions relative thereto are stayed pending arbitration of *the parties' claims* by the International Chamber of Commerce. (Order dt. 4/21/94, Adv.dkt. 103). This court again concludes that these disputes should be arbitrated. Further the court also concludes that "in the interest of justice" as that term is used in Section 1334(c)(1) [28 U.S.C.] this court should abstain from hearing these disputes thereby *allowing these parties, including the debtor, to litigate their claims in whatever court may have jurisdiction over them.* Therefore, this adversary proceeding should be dismissed, without prejudice. (Order dt. 1/10/97, Adv.dkt. 133) IT IS ORDERED that the Proofs of Claims filed by the Debtor on behalf of GEC Alsthom are withdrawn. (Order dated April 27, 1999 on Alstom's Motion to withdraw.). On January 10, 1997, the Court entered the Minute Entry/Order in Adversary No. 92-1330, which dismissed the adversary proceeding and concluded that the disputes summarized below should be arbitrated/litigated in whatever court, other than this Bankruptcy Court, that may have jurisdiction over them. . . . Tuli should not be permitted to do indirectly that which this Court has prohibited Tuli from doing directly.

Alstom's motion to withdraw Proofs of Claim. (Dkt. 246).

14. On exactly the same ground Alstom opposed Tuli's motions to: (1) vacate stay of turnover proceeding under 11 U.S.C. § 542; (2) enter summary judgment to turnover sum admittedly due, but held because of claim of damages sought to be set-off; and (3) allow referral to arbitration or mediation to settle under 11 U.S.C. § 1123(B)(3)(A) provided in then proposed Plan. (Objection, Adv.dkt. 139).

15. Because the Court of Appeals has affirmed dismissal without prejudice, of Tuli's estate's said Adversary Proceeding, not on the basis of abstention but on alternative ground of "failure to prosecute" (RA 3) for the delay in filing motion to vacate stay of the adversary proceeding, abstention from the turnover proceeding is not effective.

16. Therefore, the result of the said two orders, which have not been appealed to this Court, is to require that any adjudication of the parties' claims pertaining to the turnover proceeding (covered by the adversary proceeding dismissed without prejudice, and the Proofs of Claim that were withdrawn without prejudice) take place in arbitration or in any court, including the bankruptcy court, having jurisdiction over them. However, in respect of bankruptcy court's abstention from adversary proceeding other than the turnover proceeding under 11 U.S.C. § 542, forming part of the proceeding, Tuli did not appeal from that part, and the effect of the said two orders stated by BAP remains unchanged. The Ninth Circuit's affirmation of dismissal without prejudice of adversary proceeding (RA 2-3) for failure to prosecute, as an independent and alternative ground (with abstention as the other basis of dismissal without prejudice), applies only to the turnover part of the adversary proceeding. Dismissal without prejudice, of the part of the adversary proceeding (other than turnover proceeding under 11 U.S.C. § 542) on the independent and alternative basis of abstention, has the effect of staying federal as well as the state law part of the adversary proceeding until after the adjudication of the state law part in any court other than the bankruptcy court. This is based on *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 8-13, nn. 8, 11, 103 S.Ct. 927, 933-935, & nn. 8, 11, 74 L.Ed.2d 765 (1983). In footnote 8, this Court stated:

> This oddity [because Pullman abstention is implemented in 49 states by a stay, and only in Texas by dismissal] illustrates the artificiality of

> resting appealability on an otherwise *substanceless distinction between stays and dismissal in the present [abstention] context.*

Also, *England v. Louisiana State Bd. of Med. Exam.*, 375 U.S. 411, 84 S.Ct. 461 (1964) (*Abstention does not involve abdication of federal jurisdiction, but only postponement of its exercise. Abstention doctrine does not require a party to litigate its federal claims in state courts.*)

17. *Alstom has admitted this effect of dismissal without prejudice* in the context of abstention from state law part of the adversary proceeding, *as follows*, in its Reply to Tuli's response to Alstom's motion to dismiss BAP Appeal #AZ-97-1124, filed 4/2/99 in Bankruptcy Appellate Panel (BAP dkt. 61), on page 5, lines 21-23:

> In this case, *the bankruptcy court dismissed Tuli's adversary proceeding without prejudice to Tuli reinstating it after completing arbitration [or litigation in any court other than the bankruptcy court]* before the ICC.

18. Petitioner has relied on the above effect of dismissal of state law part of the adversary proceeding, without prejudice, stated by Alstom before BAP, and has not appealed from orders dismissing adversary proceeding and withdrawing Proofs of Claims, without prejudice (Adv.dkt. 133, and Case dkt. 402, respectively), because, according to Alstom, dismissal without prejudice is without prejudice to Tuli reinstating it after adjudication of state law claims in any court other than bankruptcy court, or in arbitration, alternatively, consistent with Alstom's position stated in its Objection to vacate stay of turnover proceeding and entry of summary judgment in respect of admitted dues of Tuli's predecessor Consort, as well as Alstom's position in its Motion to withdraw Proofs of Claims (Adv.dkts. 139, 246, respectively), which is:

> On January 10, 1997, the Court entered the attached Minute Entry/Order [Adv.dkt. 133] in Adversary No. 92-01330, which *dismissed this adversary proceeding* in the interest of justice under 28 U.S.C. § 1334(c)(1) *and concluded that the alleged disputes should be arbitrated/litigated in*

> *whatever court, other than this Bankruptcy Court,* that may have jurisdiction over them.

Alstom's Objection, Adv.dkt. 139, and Motion, Adv.dkt. 246.

IV. PETITIONER'S RETAINED CHAPTER 11 ESTATE'S FEDERAL AND STATE LAW CLAIMS ARE NOT TIME-BARRED.

19. In view of respondents' admission of what petitioner has also independently arrived at above, and petitioner's reliance thereon in not appealing from the court of appeals' affirmance of bankruptcy court's order dismissing adversary proceeding No. 92-1330, without prejudice (Adv.dkt. 133), that the dismissal is without prejudice to petitioner reinstating it after arbitration or litigation in any court other than bankruptcy court of the state law claims, for bankruptcy court to deal with petitioner's federal law claims, and in view of the following reasons additionally, neither federal law nor state law claims of petitioner's estate retained by confirmed plan of reorganization (RA 33), are time-barred.

20. Moreover, even before the court of appeals issue of mandate on August 30, 2001, on 02/02/99 petitioner filed notice of renewal of adversary proceeding and Motion to Reinstate (Adv.dkt. 160), and again on 08/15/01 (Adv.dkt. 170) he renewed it.

21. Respondents have waived their statute of limitation defense by not properly relying on Arizona Revised Statute (A.R.S.) § 12-552, by withholding relevant part, § 12-552(G), which provides:

> With respect to an improvement to real property that was substantially complete on or before September 15, 1989, the eight and nine-year periods established in subsection A and B of this section shall begin to run on September 15, 1989. Notwithstanding the provisions of subsection E of this section and § 12-505, subsection A, this subsection applies to claims that accrued before

> the effective date of this amendment to this section.

Hence, the eight-year period should have commenced Sept. 15, 1989, but because of the tolling effect of A.R.S. § 12-501, the statute of limitation did not start until November 20, 1991, when Order for relief under chapter 11 was entered (Case dkt. 25) and under the federal jurisdiction process could be served on respondents outside the territory of Arizona, but until they voluntarily appeared in the bankruptcy court on Oct. 11, 1994, in chapter 11 case of petitioner, they disputed proper service on the Swiss respondent, Alstom who is the main party to the adversary proceeding. Hence, until October 11, 1994, Alstom AG was absent from Arizona in terms of A.R.S. § 12-501. So the 8 year statute (§ 12-552) commenced from 10/11/94 and cannot expire prior to 10/11/2002. Moreover, for suing Alstom or arbitration against it in Switzerland the Swiss statute of prescription (Art. 127), Swiss Code of Obligations, is ten (10) years, and is interrupted when bankruptcy petition was commenced in Arizona on Sept. 11, 1991, and has since been interrupted, commencing a fresh 10 years period, with each act relating to the bankruptcy case, including adversary proceeding, under Arts. 135, 137, 138. Swiss Code of Obligations, Simon L. Goren, Fred B. Rothman & Co., Littleton, CO 1987.

CONCLUSION

In view of misfounded and frivolous position of respondents, and the great importance of the question(s) presented in the petition both for rehabilitation of petitioner and his alter ego Consort and for payment of creditors, to implement confirmed plan of reorganization, as also for fulfillment of purposes of chapter 11, petitioner prays as the representative of his retained estate, for grant of the petition.

April 1, 2002

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